

PRESERVING A FRESH START FOR THE INDIVIDUAL DEBTOR: THE CASE FOR NARROW CONSTRUCTION OF THE CONSUMER CREDIT AMENDMENTS

KAREN GROSS†

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† Associate Professor of Law, New York Law School. B.A. 1974, Smith College; J.D. 1977, Temple University School of Law.

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[Editors' Note: The *University of Pennsylvania Law Review*, as a matter of policy, uses the feminine pronoun ("she") as the generic personal pronoun.]

INTRODUCTION

The opportunity for an individual debtor to obtain relief from indebtedness and begin anew as a productive member of society—commonly termed the “fresh start policy”—has been an essential principle of our bankruptcy laws for more than seventy-five years.¹ Although bankruptcy legislation reflects a longstanding struggle to reconcile the debtor’s ability to retain future earnings with her creditors’ legitimate desires to maximize their recoveries,² the fresh start policy had not been directly threatened until the passage of the Consumer Credit

¹ See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (Bankruptcy law “gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”); see also *Perez v. Campbell*, 402 U.S. 637 (1971) (striking down section of state statute that conflicted with the fresh start policy); *Segal v. Rochelle*, 382 U.S. 375, 380 (1966) (suggesting right of bankrupt to “start out on a clean slate”). For commentary on the fresh start policy, see A. COHEN, *BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS* 182 (1981); T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 225-52 (1986); Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982); Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985). For a general history of bankruptcy law and policy in the nineteenth and early twentieth centuries, see C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935).

This Article does not, as a primary focus, address whether the fresh start policy should be retained as a major component of the bankruptcy system. Analysis of the theoretical justifications for discharge is an area of burgeoning scholarship, and, while aspects of these theories appear at various junctures throughout this Article, their appearance herein is not intended as a systematic analysis of the fresh start policy.

² See L. KING & M. COOK, *CREDITORS’ RIGHTS, DEBTORS’ PROTECTION AND BANKRUPTCY* 777 (1985).

As a generalization, the bankruptcy law has two basic purposes: (1) to provide an equitable distribution to unsecured creditors of the proceeds from the debtor’s nonexempt property; and, (2) to provide the honest debtor with a discharge from the debts or, stated somewhat differently, to permit the honest debtor a new financial life. Many cases have referred to this as the ‘fresh start’ doctrine.

Id.

The effort to balance the respective rights of debtors and creditors is exemplified in the scope of and exceptions to the discharge provisions, see 11 U.S.C. §§ 523, 727, 1328 (1982 & Supp. III 1985), and the exemption provisions, see, e.g., 11 U.S.C. § 522 (1982 & Supp. III 1985). The determination of what specific debt should not be discharged or what particular property should be exempt has generated considerable debate. See, e.g., Organ, “Good Faith” and the Discharge of Educational Loans in Chapter 13: Forging a Judicial Consensus, 38 VAND. L. REV. 1087 (1985); Zaretsky, *The Fraud Exception to Discharge Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 253 (1979); Note, *Toward a Reform of the Six Year Bar to Discharge in Bankruptcy*, 97 HARV. L. REV. 759 (1984); Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: “Fresh Start” Forgotten*, 52 IND. L.J. 469 (1977); Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037, 1051-54 (1985).

Amendments in July, 1984.³ The Amendments were adopted in response to concerted pressure from the consumer credit industry,⁴ ostensibly to eliminate perceived abuses⁵ of the Bankruptcy Code and the

³ See The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). Subtitle A of Title III of Pub. L. No. 98-353 is entitled the "Consumer Credit Amendments" [hereinafter "Consumer Credit Amendments" or the "Amendments"]. This Subtitle contains specific amendments to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326) (Supp. II 1978) [hereinafter the "Code" or the "Bankruptcy Code"]. It should be noted that, on October 27, 1986, President Reagan signed into law the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) — [hereinafter "Bankruptcy Act of 1986"]. With several exceptions, the 1986 Act does not blunt the threat to the fresh start policy that is the concern of this Article. All textual references to specific Code sections are hereinafter cited as "section " or "§ ."

⁴ No single group officially represents the "consumer credit industry," but the legislative hearings with respect to the Amendments produced testimony from a host of groups that extended credit to consumers. These groups included the Credit Union National Association, the National Association of Federal Credit Unions, the National Consumer Finance Association, the American Retail Federation, and the National Retail Merchants Association. While these groups may not have been in full accord with respect to all the problems concerning individual debtors, their respective views evinced certain common themes. For a summary of those views, see *infra* notes 62-66 and accompanying text.

⁵ See *In re White*, 49 Bankr. 869, 872 (Bankr. W.D.N.C. 1985) ("The consumer credit amendments . . . were the offspring of Congressional concern that credit costs were being driven upwards by the ready availability of discharge via Chapter 7 to persons seeking to sidestep consumer credit obligations who had the ability to pay."); *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6, 37 (1981) [hereinafter *Senate Hearings*] (statement of Mr. A. Brimmer, economic and financial consultant) ("[I]t appears that consumers may be taking advantage of the liberalized law to escape burdens which could be assumed and which need not necessarily lead to bankruptcy."); S. REP. NO. 305, 96th Cong., 1st Sess. 14 (1979) ("This amendment makes a change to section 1325(a)(3) so that the court should determine that the payments in the plan proposed by the debtor are the greatest that the debtor can reasonably pay so that the liberal provisions allowing composition plans in Chapter 13 will not be abused by debtors."); 130 CONG. REC. H7497 (daily ed. June 29, 1984) (Congressman Brooks, speaking on the proposed bankruptcy reforms, stated: "This bill will also make personal bankruptcy reforms by eliminating the use of the bankruptcy system by debtors who are not suffering economic hardship."); 130 CONG. REC. H1811-12 (daily ed. March 21, 1984) (Congressman Brooks stated: "These reforms, which have been proposed by my good friend Congressman Mike Synar, seek to eliminate the abuse of the bankruptcy system by debtors who are not suffering economic hardship—an abuse which has occurred with alarming frequency in recent years."); 129 CONG. REC. S5326 (daily ed. April 27, 1983) (Senator DeConcini stated: "Today there exists in the bankruptcy statute an unconscionable loophole which makes it possible for [those] who have acted with wilful, wanton, or reckless conduct and who have injured, killed or caused property damage to others to escape civil liability . . . by having their judgment debts discharged in Federal Bankruptcy court."); see also Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and a Proposal for Change*, 55 AM. BANKR. L.J. 271, 279 (1981) ("[M]any bankruptcy courts felt severely provoked by what they perceived to be distressing abuses of the liberal debtor relief provisions of the Bankruptcy Code."); Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J.

bankruptcy process by individual debtors.⁶ A broadbased reading of the Consumer Credit Amendments, however, as exemplified by the expansive⁷ paradigms developed in this Article,⁸ suggests that the effort to correct abuses has not only shifted the balance of rights decisively in favor of creditors but it has also threatened the eradication of the fresh start policy for the segment of the debtor population that benefits most from its application—namely, individuals.⁹

An individual debtor's statutory ability to obtain a fresh start has its primary locus in the discharge and exemption provisions of the Bankruptcy Code.¹⁰ Until passage of the Consumer Credit Amend-

1333, 1333 (1984) ("The 1978 Act had barely taken effect before creditor lobbying groups began to complain that it protected debtors too much and seriously injured creditors."). For a discussion of the perceived abuses, see *infra* text accompanying notes 62-78. But see 130 CONG. REC. S7624 (daily ed. June 19, 1984) (Senator Metzenbaum stated: "After reviewing the record, I was and am now convinced that the bankruptcy laws are not being abused.").

⁶ The term "individual debtor" is not defined in the Code. The general term "debtor" is defined to mean "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(12) (1982). The term "person" includes but is not limited to an individual. See 11 U.S.C. § 101(33) (1982 & Supp. III 1985). Because certain categories of "individuals" are defined in the Code, see, e.g., 11 U.S.C. § 101(27) (1982 & Supp. III 1985) ("individual with regular income"), the more general term "individual debtors," which is not defined in the Code, is used herein to include all subcategories.

⁷ As utilized in this article, the term "expansive" relates to the methodological approach for interpreting statutory language broadly. Similarly, the term "narrow" denotes an approach for interpreting language in a restrictive manner. Neither term is meant to refer to any particular ideological or otherwise "political" orientation.

⁸ In a series of articles and rebuttals, Professors Eisenberg and Harris address issues of bankruptcy policy under the Code, including the concept of discharge and mandatory Chapter 13 cases. Although neither Professor Eisenberg nor Professor Harris speaks in terms of an expansive or narrow paradigm, as those terms are used in this Article, Professor Eisenberg's approach is similar to the expansive paradigm suggested here and Professor Harris's approach is similar to the narrow paradigm. These articles antedate the Amendments, but some of these commentators' observations can readily be applied to the Amendments. See Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953 (1981) [hereinafter Eisenberg I]; Eisenberg, "Bankruptcy Law in Perspective": A Rejoinder, 30 UCLA L. REV. 617 (1983) [hereinafter Eisenberg II]; Harris, *A Reply to Theodore Eisenberg's "Bankruptcy Law in Perspective,"* 30 UCLA L. REV. 327 (1983).

⁹ Cf. Warren, *supra* note 5, at 1356 ("With adequate exemptions in place, the bankruptcy statutes permit the working poor who have become hopelessly mired in consumer debt to begin again the climb into the middle class with some assets intact."). See generally Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U.L. REV. 809 (1983) (discussing past and modern treatment of individual debtors).

¹⁰ For the nonbankruptcy specialist, a general overview of the treatment individual debtors are accorded under the Code prior to the 1984 Amendments may facilitate an understanding of the changes wrought by the Consumer Credit Amendments.

Individuals are entitled to seek relief under Chapters 7, 11, 12, and 13 of the Code, respectively. Each of these chapters has different goals and, to that extent, provides for different treatment of debtors. This Article will not deal with Chapter 12,

ments, an individual debtor could obtain a discharge under the Code in

which was added to the Code by the Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) — .

Chapter 7 is a liquidation chapter. See R. AARON, BANKRUPTCY LAW FUNDAMENTALS § 1.03 (1986) . A debtor can seek relief under this chapter voluntarily or can be the subject of an involuntary petition. There are no entry-level requirements for the debtor who voluntarily seeks relief; she does not have to be insolvent nor does she need a certain amount of debt or a debt of a particular nature. She does not even need to be unable to pay her debts as they mature. In the context of an involuntary case, on the other hand, creditors would have to show that the debtor was not paying her creditors on a regular basis, although there would be no need to show insolvency. See *id.*

Under a Chapter 7 case, the debtor's property becomes property of the estate. See 11 U.S.C. § 541 (1982). Expressly excluded from this pool of assets are the future earnings of the debtor, see § 541(a)(6) (excepting "earnings from services performed by an individual debtor after commencement of the case"), which she is entitled to retain for purposes of effectuating her fresh start. The Code also permits the debtor to retain a portion of the property of the estate as exempt. See 28 U.S.C. § 541(b) (1982). Simply stated, although the Code broadly defines property of the estate, the debtor is allowed to keep certain specifically identified property to assist her in her fresh start. The amount of property a debtor is permitted to retain is determined in certain circumstances by federal bankruptcy law and in other instances by state law. In either event, after the debtor keeps the property to which she is entitled, the remaining (non-exempt) property is distributed to unsecured creditors in accordance with a priority scheme stated in the Code. See 11 U.S.C. § 726 (1982).

The Code provides that a debtor who has turned over her non-exempt assets to creditors (via a trustee) is entitled, subject to certain specific exceptions described below, to a discharge; thereafter, creditors are prohibited from collecting the balance of what is owed them, absent an agreement by the debtor to the contrary. See 11 U.S.C. §§ 524, 525 (1982). There are, however, several key restrictions on discharge. For example, a discharge is not permitted if the debtor has perpetrated a fraud on her creditors or failed to disclose assets. See 11 U.S.C. § 727(a) (1982). The Code also contemplates that, while a debtor may be able to obtain a discharge of her debts generally, certain specific categories of debt will be nondischargeable, notwithstanding that the debtor has exhibited none of the prohibited conduct that would preclude a general discharge. See 11 U.S.C. § 523 (1982). The specific categories of debt excepted from discharge reflect social, political, and economic policy decisions. For example, one cannot discharge one's obligation to pay alimony and child support and one cannot discharge certain student loans from a governmental unit. See 11 U.S.C. § 523(a) (1982).

An individual with regular income and secured and unsecured debts, within certain statutory limits, is entitled to seek relief under Chapter 13. There can be no *involuntary* Chapter 13 cases. The purpose of Chapter 13 is to allow a debtor to repay her creditors out of future income over an extended period of time. The theory has been that creditors will get more (and are required by the Code to get at least as much) as they would receive in a Chapter 7 case. See generally R. AARON, *supra*, at § 1.06 ("The basic idea of chapter 13 is an installment repayment by composition or extension by use of income received after the commencement of the case."). As a technical matter, all of the debtor's property, including her future income, becomes property of the estate, see 11 U.S.C. § 1306 (1982), but the debtor chooses how much her creditors receive and over what period of time, up to a maximum of three (although the court, for cause, may extend the period to five) years. See 11 U.S.C. §§ 1322(a)(1), 1322(c) (1982). Under a Chapter 13 plan, the debtor does not give up any of her existing assets; none of her property is sold for the benefit of her creditors.

Confirmation of a Chapter 13 plan is conditioned upon several distinct statutory requirements. For example, the Chapter 13 plan must be in the best interests of the creditors and proposed by the debtor in good faith. See 11 U.S.C. § 1325(a) (1982). All creditors of a like class must be treated equally, thereby promoting equality of distribu-

one of two ways: either by surrendering non-exempt assets that then

tion among similarly situated creditors. See 11 U.S.C. § 1322(b)(1) (1982). Creditors may not vote on the Chapter 13 plan, but they may object to its confirmation. However, if the statutory provisions are satisfied, a court can confirm a plan even though creditors are dissatisfied with what they are to receive. See 11 U.S.C. § 1325(b) (1982). This makes Chapter 13 particularly appealing to debtors. Recalcitrant and angry creditors cannot block a debtor's efforts to reorganize.

Once a plan is confirmed and a debtor makes all of the required payments under the Chapter 13 plan, she is entitled to a discharge. See 11 U.S.C. § 1328 (1982). The discharge in a Chapter 13 is substantially broader than the Chapter 7 discharge described above. With the exception of alimony and child support, virtually all debts are discharged, even those incurred through fraud, nondisclosure, and other wrongdoing. While the breadth of the Chapter 13 discharge has been the subject of considerable controversy, it does enable a debtor, after completion of plan payments, to begin anew. In circumstances involving a hardship, a debtor can obtain a discharge even though she has not completed payments under the plan and such discharge will have much of the breadth of the discharge obtained when there is full compliance with plan provisions. See 11 U.S.C. § 1328 (1982).

Chapter 11, for which an individual is eligible, is also a reorganization chapter, although it is designed for the corporate debtor. A Chapter 11 case can be filed voluntarily or involuntarily. There are no entry-level requirements to be a debtor in Chapter 11, akin to Chapter 7 and unlike Chapter 13. For an involuntary petition to succeed, there must be a showing, as in the context of an involuntary Chapter 7 case, that the debtor is not paying her debts as they mature. See J. ANDERSON, CHAPTER 11 REORGANIZATIONS § 6.10 (1984) ("Because of the seriousness of the involuntary proceeding, counsel for the petitioning creditors should make an investigation as to whether the debtor is making payments to other creditors as they come due."). See generally R. AARON, *supra*, at § 1.04.

As in Chapter 7, all of the debtor's assets in a Chapter 11 case become property of the estate except the individual debtor's future income. See 11 U.S.C. § 541(b) (1982). The Code contemplates the creation of one or more creditors' committees to oversee the organization process, see 11 U.S.C. § 1102 (1982), a concept that may be workable with large debtors in the corporate arena but that is difficult to implement in the small, oft-times no-asset, cases of individuals. See LoPucki, *The Debtor in Full Control—System's Failure Under Chapter 11 of the Bankruptcy Code*, 57 AM. BANKR. L.J. 99 (1983). Unlike a Chapter 13 case, where there is a standing trustee, the debtor in a Chapter 11 case remains fully in control, unless a trustee is appointed. See 11 U.S.C. § 1107(a) (1982).

In a Chapter 11 case, the debtor is required to propose a plan of reorganization, and, if she fails to do so in the requisite time period, her creditors are entitled to file a plan for her, a feature that distinguishes Chapter 11 from Chapter 13. See 11 U.S.C. § 1121 (1982). Furthermore, a Chapter 11 plan requires disclosure to and voting by creditors. Subject to certain statutory exceptions, the Chapter 11 plan must be approved by one-half in number and two-thirds in amount of all creditors who voted. See 11 U.S.C. § 1126 (1982). Unlike a Chapter 13 case, there are no limits on the duration of a Chapter 11 plan, although the contents of the plan must comport with certain statutory mandates. See 11 U.S.C. § 1123 (1982).

Assuming confirmation of the Chapter 11 plan, a debtor is entitled to a discharge. None of the debts generally or specifically excepted from discharge in Chapter 7, however, are discharged in Chapter 11. See 11 U.S.C. § 1141(d)(3)(C) (1982). This result is significantly different from that which occurs under Chapter 13. Further, the discharge is technically effective earlier in a Chapter 11 case. The narrow discharge in Chapter 11 makes it considerably less appealing to individual debtors.

The differences between Chapters 7, 11, and 13 mean that individuals must carefully evaluate what they need to achieve under the federal bankruptcy laws and the best way of attaining those goals. For a more detailed analysis of the options available to

would be distributed to her creditors by a trustee in a Chapter 7 (liquidation) case¹¹ or by readjusting her outstanding indebtedness in a Chapter 13 (reorganization) plan through which her creditors would receive, from payments derived from her ongoing earnings over a three to five year period, at least the value of her non-exempt assets.¹² Whether she ultimately filed under Chapter 7 or under Chapter 13, an individual debtor could, and in many instances did, obtain relief from prefilings indebtedness by paying her creditors no more than the value of her then available assets.¹³ Consequently, a debtor was able to retain a significant portion of her future earnings, thereby preserving her self-respect and creating incentive for her to work again.¹⁴

The statutory threat to the fresh start policy is found primarily in three specific sections of the Consumer Credit Amendments. Section 312 (now section 707(b) of the Code) provides that an individual debtor's access to a Chapter 7 case can be eliminated if the court determines that such a filing would be a "substantial abuse," even though the statute does not identify the subject of such abuse.¹⁵ Section 317 (now section 1325(b) of the Code) mandates that, if a creditor objects to an individual debtor's Chapter 13 plan, a bankruptcy court should not confirm the plan (or grant a discharge) unless the debtor utilizes all of her "projected disposable income" over the next three years to make payments under her plan.¹⁶ Lastly, section 319 (amending section

individual debtors, see A. COHEN, *supra* note 1. As to whether some of the underlying assumptions surrounding choices for individual debtors are in fact substantiated, see Sullivan, Warren & Westbrook, *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 AM. BANKR. L.J. 283 (1986).

¹¹ See 11 U.S.C. §§ 522 (exemptions), 523 (exceptions to discharge), 524 (effect of discharge), 726 (distribution of property of the estate) (1982 & Supp. III 1985).

¹² See 11 U.S.C. §§ 1322 (contents of plan), 1325 (confirmation of plan), 1328 (discharge) (1982 & Supp. III 1985).

¹³ See 11 U.S.C. § 1325(a)(4) (1982 & Supp. III 1985).

¹⁴ See, e.g., Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785 (1983) ("One reason for giving the debtor a fresh start is to counteract the self-hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets."); Schuchman, *An Attempt at a "Philosophy of Bankruptcy"*, 21 UCLA L. REV. 403, 458-64 (1973) (discussing utilitarian underpinnings of discharge and concluding that "individuals will perceive that their personal bankruptcy brought about, on the whole, more good than bad consequences").

¹⁵ For a detailed discussion of § 707(b), see *infra* notes 104-224 and accompanying text.

¹⁶ For a detailed discussion of § 1325(b), see *infra* notes 225-352 and accompanying text. This Article does not address § 1325(b)(2)(B), which attempts to define disposable income in the context of businesses operating in a Chapter 13. For an analysis of this particular subsection, see Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 WM. & MARY L. REV. 91, 159 (1985). For an analysis of the import of the distinction between consumer and business debts in Chapter 13, see Sullivan, Warren & Westbrook, *supra* note 10, at 302-11.

1329(a) of the Code) permits an unsecured creditor to seek an increase in an individual debtor's payments under a Chapter 13 plan.¹⁷ Because these sections raise the barriers to discharge, they substantially curtail the availability of a discharge and the individual debtor's influence in cases filed under Chapters 7 and 13 of the Code.¹⁸ As such, they have provided the courts with the power to destroy the fresh start policy as applied to individual debtors.

The potential for interpreting these three statutory provisions so as to annihilate the fresh start policy arises from a combination of factors. First, the language of all three sections is expansive.¹⁹ Second, to the extent that definitional provisions are included at all, they are far from concrete.²⁰ Third, there is a paucity of clear legislative history and, therefore, a resulting lack of definitive interpretive guidance.²¹ Lastly,

¹⁷ For a detailed discussion of § 1329(a), see *infra* notes 353-393 and accompanying text.

¹⁸ King and Cook have recognized that such heightened standards do not comport with bankruptcy policy:

[I]t is not necessary that the debtor have property available for distribution to creditors in order to be entitled to a discharge. There is no such *quid pro quo* requirement. As a matter of fact, it is this very lack which renders the United States law so radically different from the law in most other nations.

L. KING & M. COOK, *supra* note 2, at 777.

¹⁹ Cf. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of 'Substantial Abuse'*, 59 AM. BANKR. L.J. 327, 344 (1985) [hereinafter Breitowitz, Installment I] (noting fact that § 707(b) does not define "substantial abuse," and that there is no legislative history to explain what Congress meant); Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of 'Substantial Abuse'*, 60 AM. BANKR. L.J. 33, 67 (1986) [hereinafter Breitowitz, Installment II] (concluding that the important issue to be resolved is whether the "vague, undefineable standard" of what constitutes "substantial abuse" should be read to foreclose certain debtors from relief, "even if their conduct is not in fact 'abusive'"). See generally Morris, *supra* note 16, at 164 (discussing the Amendments and concluding that "the Bankruptcy Amendments Act may have been based on an overstatement of the problems under the 1978 Code, and significant inadequacies and injustices may occur when the amended Code provisions are applied").

²⁰ See, e.g., *In re Kitson*, 65 Bankr. 615, 618 (Bankr. E.D.N.C. 1986); *In re Hudson*, 64 Bankr. 73, 75-76 (Bankr. N.D. Ohio 1986); *In re Kress*, 57 Bankr. 874, 877 (Bankr. D.N.D. 1986); *In re Kelly*, 57 Bankr. 536, 538 (Bankr. D. Ariz. 1986); *In re Mastroeni*, 56 Bankr. 456, 460 (Bankr. S.D.N.Y. 1985); *In re Edwards*, 50 Bankr. 933, 936 (Bankr. S.D.N.Y. 1985); *In re White*, 49 Bankr. 869, 871-73 (Bankr. W.D.N.C. 1985).

²¹ There is actually very little "official" legislative history accompanying the 1984 Amendments. The Amendments were passed without an official report from the House or the Senate. Hearings were held on a myriad of proposed changes to the Code dating back to March of 1979 and there were statements made on the floors of each of the House and Senate on the date of passage of the Amendments, namely June 29, 1984. See, e.g., 130 CONG. REC. H7489-7500, S8887-8900 (daily ed. June 29, 1984); 130 CONG. REC. S7615-25 (daily ed. June 19, 1984); 130 CONG. REC. H1796-1854 (daily ed. March 21, 1984); see also S. 658, 96th Cong., 1st Sess., 125 CONG. REC. 5027-32 (1979) (bill to correct technical and minor substantive errors in 1978 version of Bank-

to date, there are no rules implementing the practice and procedure under section 707(b), although such rules clearly were contemplated by the Amendments.²² In November, 1985, the Judicial Conference circulated preliminary drafts of implementing rules but, in their present form, the draft rules fail to resolve the interpretive difficulties raised by the Amendments.²³

These elements have combined to give judges and lawyers considerable discretion in interpreting and applying the Amendments. This interpretive latitude already has been evidenced by the growing number of individual debtor cases decided in which the Amendments have been

ruptcy Code). Thus, while there is a great deal of information that was elicited at hearings with respect to various proposed legislative changes, there is no single report or text that definitively evidences the congressional intent behind any given section. This dilemma was recognized by Representative Hyde who, at a hearing on March 21, 1984, stated, "We avoid providing a sound, authentic basis for legislative history, that unique resource most relied upon by the courts to plumb the legislative intent of this learned body." 130 CONG. REC. H1796-1854, H1809 (daily ed. March 21, 1984); cf. *In re Grant*, 51 Bankr. 385, 388-93 (Bankr. N.D. Ohio 1985) (attempting to cull from the "unofficial" legislative history an interpretation of § 707(b)).

Difficulties in determining legislative intent with respect to the Code have arisen with regularity. This can be partially explained by the fact that the key House and Senate reports to the Code antedate the actual date of passage of the Code. See, e.g., S. REP. NO. 989, 95th Cong., 2nd Sess. (1978) [hereinafter SENATE REPORT]; H.R. REP. NO. 595, 95th Cong., 1st Sess. (1977) [hereinafter HOUSE REPORT]. Because changes were made to the Code right up to the date of its enactment, the reports are "incomplete." Thus, for a fuller understanding of the Code, one must look at statements made in the House and Senate up to and including the dates the bill was passed in each respective congressional body. For a welcome explanation of the legislative history of the Code, see *In re Keniston*, 60 Bankr. 742, 744-45 (Bankr. D.N.H. 1986); Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275, 276 (1980); see also *supra* note 5 and accompanying text.

²² Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 320, 98 Stat. 333, 357 (codified at 28 U.S.C. § 2075 (Supp. III 1985)), provided that the Supreme Court would prescribe the rules to be followed under § 707(b).

²³ The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amending existing Rule 1017, dealing generally with dismissal and suspension, by, among other changes, adding a new subsection (e) that provides:

(e) Dismissal of Individual Debtor's Chapter 7 Case for Substantial Abuse. An individual debtor's case under Chapter 7 may be dismissed for substantial abuse only after a hearing on notice to the debtor and the trustee and such other parties in interest as the court directs. The notice shall advise the debtor of all matters which the court will consider at the hearing.

Proposed Amendment to Rule 1017, Bankr. L. Rep. (CCH) ¶ 21,017 (1986); see also *Central Nat. Bank of Woodway-Hewitt v. Spark*, 61 Bankr. 285, 286 (Bankr. W.D. Tex. 1986). The Committee note adds only that the failure of the debtor to attend the required hearing is not a basis for dismissal under § 707(b).

The newly enacted Bankruptcy Act of 1986 addresses at least some aspects of the procedural problem of who can bring a motion under § 707(b). See Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —.

construed.²⁴ In the burgeoning case law under sections 707(b), 1325(b), and 1329(a), many courts have given an expansive interpretation of these sections.²⁵ This broad interpretation has resulted in the dismissal of an increasing number of Chapter 7 cases,²⁶ heightened standards for confirmation of Chapter 13 plans in which the principal issue has been the amount of projected disposable income that will be available to creditors, and an increasing willingness to permit amendments to existing plans.²⁷ These decisions take on added significance in view of the fact that, for obvious economic reasons, individual debtors are unlikely to appeal many of the decisions adverse to their interests.

One material consequence of an expansive interpretation of the Amendments is the possibility that, in certain circumstances, an individual debtor could be precluded from filing a Chapter 7 case simply because she would be found able to repay creditors in full, by application of her projected disposable income for the succeeding three years, under a Chapter 13 plan.²⁸ Thus, the Code as amended may effectively require an individual to work for her creditors (who could demand in-

²⁴ See, e.g., *In re Jones*, 55 Bankr. 462 (Bankr. D. Minn. 1985); *In re Festner*, 54 Bankr. 532 (Bankr. E.D.N.C. 1985); *In re Grant*, 51 Bankr. 385 (Bankr. N.D. Ohio 1985); *In re Edwards*, 50 Bankr. 933 (Bankr. S.D.N.Y. 1985); *In re Bryant*, 47 Bankr. 21 (Bankr. W.D.N.C. 1984). To date, there have been approximately two dozen cases under §§ 707(b), 1325(b), and 1329(a) addressing the specific issues highlighted in this Article.

²⁵ See, e.g., *In re Rogers*, 65 Bankr. 1018 (Bankr. E.D. Mich. 1986); *In re Tracy*, No. 86-A-0481 (Bankr. D. Md. Oct. 17, 1986); *In re Kitson*, 65 Bankr. 617, 620-21 (Bankr. E.D.N.C. 1986); *In re Hudson*, 64 Bankr. 73 (Bankr. N.D. Ohio 1986); *In re Campbell*, 63 Bankr. 702 (Bankr. W.D. Mo. 1986); *In re Shands*, 63 Bankr. 121 (Bankr. E.D. Mich. 1985); *In re Keniston*, 60 Bankr. 742 (Bankr. D.N.H. 1986); *In re Saunders*, 60 Bankr. 187 (Bankr. N.D. Ohio 1986); *In re Red*, 60 Bankr. 113 (Bankr. E.D. Tenn. 1986); *In re Kress*, 57 Bankr. 874, 878 (Bankr. D.N.D. 1985); *In re Kelly*, 57 Bankr. 536, 539 (Bankr. D. Ariz. 1986); *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985); *In re Koonce*, 54 Bankr. 643 (Bankr. D.S.C. 1985).

²⁶ See, e.g., *In re Hudson*, 64 Bankr. at 75; *In re Kress*, 57 Bankr. at 878; *In re Kelly*, 57 Bankr. at 539; *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985); *In re Grant*, 51 Bankr. at 394-97; *In re Bryant*, 47 Bankr. at 24-26; *cf. In re Edwards*, 50 Bankr. at 935 (Although the court did not dismiss the Chapter 7 petition, it articulated in dicta a very high standard of screening Chapter 7 petitions when evaluating them for "substantial abuse." This standard, the court reasoned, would lead to either more dismissals of Chapter 7 cases or more conversions to Chapter 13.).

²⁷ See, e.g., *In re Rogers*, 65 Bankr. at 1021-22; *In re Kitson*, 65 Bankr. at 622; *In re Red*, 60 Bankr. at 116; *In re Jones*, 55 Bankr. 462, 466 (Bankr. D. Minn. 1985); *In re Krull*, 54 Bankr. 375, 378 (Bankr. D. Colo. 1985); *In re Peterson*, 53 Bankr. 339, 341 (Bankr. D. Or. 1985).

²⁸ See, e.g., *In re Kitson*, 65 Bankr. at 622; *In re Hudson*, 64 Bankr. at 75-76; *In re Kress*, 57 Bankr. at 878; *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985); *In re Edwards*, 50 Bankr. at 937 & n.3.

creased payments on an ongoing basis) for three years as a condition to discharge. Strong bankruptcy policy considerations militate against such a result.²⁹ In addition, it can be argued—and has been argued in the context of prior legislative proposals the effect of which closely parallel those resulting from an expansive interpretation of the Amendments—that an expansive interpretation of the Amendments violates the spirit if not the letter of the thirteenth amendment, as enforced by the anti-peonage laws.³⁰ While an expansive interpretation of the

²⁹ See HOUSE REPORT, *supra* note 21, at 94, 120. The term “mandatory Chapter 13” is used frequently in this context although the term has not been specifically defined. In a very general sense, it might be defined as the “forced reorganization of individuals.” One of the central issues is how “forced” something must be to be truly mandatory. The concept of a mandatory Chapter 13 has had its proponents, *see, e.g.*, Eisenberg I, *supra* note 8, at 980 (“[L]inking the discharge to some effort to repay out of future earnings can lead to a more efficient self-regulating mechanism under which debtors themselves avoid questionable bankruptcies.”), and its opponents, *see, e.g.*, Ayers, *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharge to Consumers*, 17 NEW ENG. L. REV. 719, 728 (1982) (“[T]he attempt to make chapter 13 mandatory ignored significant constitutional and practical objections and was specifically rejected by the proponents of the Improvements Act.”); Boshkoff, *supra* note 1, at 116 (noting that “Congress rejected the view that debtors should be coerced into entering Chapter 13”); Countryman, *supra* note 9, at 826-27 (“[T]he consumer credit industry] is proposing what it was proposing before the new Bankruptcy Code was adopted: a modest proposal for a return to the indentured servant device of seventeenth-century colonial days . . . along with a severe restriction on the availability of the voluntary petition introduced in this country in 1841 . . .”).

³⁰ For instances in which this argument has been made, *see Bankruptcy Reform: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 257, 257 (1983) (statement of Lawrence P. King, Professor of Law, New York University School of Law) (“[Proposal] while perhaps not violative of the 13th Amendment to the Constitution comes very close to it in word and spirit.”); *Senate Hearings*, *supra* note 5, at 142 (statement of Vern Countryman, Professor of Law, Harvard University Law School) (“We would be turning our backs on our history . . . if we were now to enact a mass peonage statute whereby the debtor’s discharge is to be delayed for a 15-year period of bondage during which his future earnings are sequestered for the benefit of his existing creditors.”); *cf. Wage Earner Plans Under the Bankruptcy Act: Hearings Before Subcomm. No. 4 of the House Comm. of the Judiciary*, 90th Cong., 1st Sess. 105 (1967) (statement of J. Doherty) (noting that a coercive Chapter 13 plan “raises serious questions of personal liberties and rights”); *Uniform System of Bankruptcy: Hearings Before the Subcomm. of the Senate Comm. on the Judiciary*, 72nd Cong., 1st Sess. 535, 546 (1932) [hereinafter *Uniform Hearings*] (statement of H. Feibelman) (“[T]he stringent provisions of this proposed amendment [are] absolutely out of step with our conception of liberty.”).

The argument has also been made in some bankruptcy opinions. *See, e.g., In re Deaton*, 65 Bankr. 663, 665 (Bankr. S.D. Ohio 1986) (rejecting notion that Congress intended a mandatory Chapter 13 because such a proposal would place unbearable stress on the bankruptcy court system); *In re Graham*, 21 Bankr. 235, 238 (Bankr. N.D. Iowa 1982) (quoting HOUSE REPORT, *supra* note 21, at 120) (noting congressional refusal to create an involuntary Chapter 13 because of constitutional prohibition of involuntary servitude); *In re Noonan*, 17 Bankr. 793, 799 (Bankr. S.D.N.Y. 1981) (“Congress acted to dispel even the remotest possibility of involuntary servitude by prohibiting involuntary chapter 13 cases.”); *In re Markman*, 5 Bankr. 196, 198-99

Amendments does not result in a direct constitutional violation, it does violate the policy and philosophy underlying the antipeonage laws, thereby further eroding the fresh start policy.³¹

These serious adverse consequences of the Consumer Credit Amendments can be eliminated, however, by according the Amendments a narrow interpretation that is fully consistent with established principles of statutory construction. This Article proposes an interpretive approach to the Amendments that would permit the realization of the legitimate objectives of the legislation³² without compromising the fresh start policy that is at the core of our bankruptcy laws. This proposed approach requires that the Amendments be read in the context of the Code as an integrated whole against a background of bankruptcy philosophy generally. If one recognizes that Congress did not intend to change the fresh start policy's status as a cornerstone of the bankruptcy system, then the suggested reading is justified and necessary.

The narrow statutory interpretation suggested in this Article through the development of narrow paradigms may also avoid a critical anomaly. If the Amendments continue to be accorded the broadbased interpretation that has been increasingly reflected in recent cases,³³ it is possible that fewer debtors will seek relief under the Code. Creditors may find themselves having to rely upon time-consuming, nonuniform,

(Bankr. E.D.N.Y. 1981) (quoting HOUSE REPORT, *supra* note 21, at 120) (same). The sentiment concerning the interrelationship between bankruptcy and the thirteenth amendment is encapsulated in the following passage from the HOUSE REPORT, *supra* note 21, at 120 (issued in conjunction with the passage of the Code in 1978) (footnotes omitted):

As under current law, chapter 13 is completely voluntary. This Committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The thirteenth amendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition. On policy grounds, it would be unwise to allow creditors to force a debtor into a repayment plan. An unwilling debtor is less likely to retain his job or to cooperate in the repayment plan, and more often than not, the plan would be pre-ordained to fail.

³¹ To date, there has been no systematic analysis of whether a "mandatory" Chapter 13 would violate the thirteenth amendment. Professor Eisenberg rejects, on the basis of "ignorance of constitutional law," the concept that a mandatory Chapter 13 is violative of the thirteenth amendment. See Eisenberg I, *supra* note 8, at 988-89. To date, there has been no case holding that that provision of the Code violates the thirteenth amendment. Given the frequency, however, with which the argument is raised by courts and Congress, see *supra* notes 29-30, it is high time for a detailed analysis of this issue. Cf. *In re Kress*, 57 Bankr. 874, 877 (Bankr. D.N.D. 1986) ("Neither the statute as drafted nor its framers meant it as a method of forcing consumer debtors into Chapter 13.").

³² See *infra* notes 159-68, 312-19, 390-93 and accompanying text.

³³ See *supra* notes 24-27 and accompanying text.

costly, and often ineffective state law remedies to collect what is owed them with absolutely no assurance that recoveries will match what was available under the Code prior to adoption of the Amendments.³⁴ By explicitly noting that bankruptcy law should be a "last resort,"³⁵ congressional proponents of the Amendments suggest a desire to eliminate the use of the federal bankruptcy laws as a "safe haven" by individual debtors. By choosing to aid the credit industry by reducing individual bankruptcy filings, rather than by seeking to ensure increased creditor recoveries on claims that are made, creditors may be forced to turn to those state law collection methods that provided the very impetus for federal bankruptcy reform.³⁶

Although it is reasonable to question whether the Consumer Credit Amendments should have been adopted in the first instance,³⁷

³⁴ Cf. H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. 1, at 171 (1973) ("[I]n states where there are excessive exemptions, creditors have difficulty understanding a system that allows a debtor to retain property of a value of several hundred thousand dollars, while at the same time obtaining a discharge which precludes recovery of the creditors' claims."). See D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 1-17, 41-106 (1971) [hereinafter *BROOKINGS STUDY*] (general overview of provisions of and problems inherent in bankruptcy law, including a discussion of state bankruptcy remedies); see also Sullivan, Warren & Westbrook, *supra* note 10, at 311-35 (discussing debtors' ability to repay and the 1984 Amendments).

³⁵ The HOUSE REPORT, *supra* note 21, at 117-18 (emphasis added), in summarizing the purposes of Chapter 13, states:

This bill attempts to cure these inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting consumer debtors that have occurred both in the bankruptcy court and out. First, the bill simplifies, expands, and makes more flexible wage earner plans Second, many of the provisions in the current bankruptcy law that enable private action to undo the beneficial effects of bankruptcy are changed. Third, the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start. Fourth, the bankruptcy system is modified to eliminate the close relationship between a bankruptcy judge and a trustee that often works to the consumer debtor's detriment. The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under chapter 13 . . . ; and finally, whether the debtor uses chapter 7, Liquidation, or chapter 13, Adjustment of Debts of an Individual, *bankruptcy relief should be effective, and should provide the debtor with a fresh start.*

³⁶ See authorities cited *supra* note 34.

³⁷ For arguments questioning whether the amendments should have been adopted at all, see Countryman, *supra* note 9, at 826-27 (criticizing the proposed bankruptcy amendments as the credit industry's attempt to use the federal bankruptcy courts for "free collection services"); Ginsberg, *The Proposed Bankruptcy Improvement Act: The Creditors Strike Back*, 3 N. ILL. U.L. REV. 1, 72 (1982) [hereinafter Ginsberg, *The Proposed Bankruptcy Improvement Act*] ("Such fundamental changes in bankruptcy philosophy require considerably more study and effort than has gone into the BIA."); Ginsberg, *The Bankruptcy Improvements Act—An Update*, 3 N. ILL. U.L. REV. 235, 251 (1983) [hereinafter Ginsberg, *Update*] ("Frankly, the OBIA seems to be an attempt by creditor interests to swing the bankruptcy law pendulum as far their way as

and one's response might well be that the Amendments do not make sense, the possibility of yet another major Code revision in the near future is improbable at best.³⁸ Therefore, rather than criticize the inadequacies of the Amendments and argue for their repeal or modification, this Article will attempt to provide practical interpretive guidance to aid courts and lawyers in their almost daily confrontation with the problems the Amendments raise.

To that end, this Article begins with an overview of the Consumer Credit Amendments and the historical events that preceded their passage.³⁹ The Article then analyzes how sections 707(b), 1325(b) and 1329(a) can be and have already been interpreted in an overly expansive fashion and suggests, in contrast, the beneficial and operative features of a narrow statutory interpretation, aspects of which have been adopted recently by a small number of the courts.⁴⁰ In that context, the Article probes the expansive paradigm, examining the reasons for concluding that it violates bankruptcy policy and the spirit of the thirteenth amendment and the antipeonage laws.⁴¹ The Article concludes by harmonizing a narrow interpretation of the Consumer Credit Amendments with the fresh start policy and reflecting on how such an interpretation

they think they can get away with in the current political environment.”); Sullivan, Warren & Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1146 [hereinafter Sullivan, Warren & Westbrook, *Limiting Access*] (“We should not permit purveyors of high risk credit to lure the undisciplined further into debt and then to use the great, expensive engine of the law to collect their debts by making the undisciplined live for five years at the poverty level”); Sullivan, Warren & Westbrook, *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087, 1088 [hereinafter Sullivan, Warren & Westbrook, *Rejoinder*] (arguing that an influential study in the adoption of the amendments was deeply flawed both in its methodology and in its failure to consider broader policy issues implicated by a bankruptcy scheme); Warren, *supra* note 5, at 1357 (“[T]he credit industry’s continuing assertions of a bankruptcy ‘crisis’ . . . [may] result in important concessions—even though no one has proven any underlying need for bankruptcy reform.”).

³⁸ Given the passage of new legislation in 1986, *see supra* note 3, it is unlikely that a new comprehensive legislative scheme will be passed in the near future. Even though specific concerns surrounding the Consumer Credit Amendments were in existence at the time of the 1986 legislation, little was done to address the needs of the consumer debtor. In fact, to the extent changes were made, they strengthen the rights of creditors. *See infra* note 105.

³⁹ *See infra* text accompanying notes 43-103.

⁴⁰ *See infra* text accompanying notes 104-393. This approach has been adopted by a small number of courts to date. *See, e.g., In re Deaton*, 65 Bankr. 663, 664-65 (Bankr. S.D. Ohio 1986); *In re Gaukler*, 63 Bankr. 224, 226 (Bankr. D.N.D. 1986); *In re Green*, 60 Bankr. 547 (Bankr. C.D. Cal. 1986); *In re Tinneberg*, 59 Bankr. 634 (Bankr. E.D.N.Y. 1986).

⁴¹ *See cases cited supra* note 40.

inures, in both the long and short term, to the benefit of debtors and creditors alike.⁴²

I. BACKGROUND OF THE CONSUMER CREDIT AMENDMENTS

Individual debtors have long been accorded special treatment under the federal bankruptcy laws.⁴³ Provisions designed to assist individual debtors in achieving a fresh start were included in the Bankruptcy Act of 1898 and strengthened by the adoption of the Chandler Amendments in 1938.⁴⁴ All of the individual debtor protections contained in the Code are premised on the belief that, although recourse to bankruptcy is not a preferred course of action and individuals ought to repay their debts, there is nothing inherently wrong with being unable to repay one's debts or with seeking the relief that the Code provides.⁴⁵

⁴² See *infra* text accompanying notes 394-408.

⁴³ Statutory relief for the financially distressed wage earner has been available to some extent as early as the Bankruptcy Act of 1867, ch. 176, 14 Stat. 517. See *Perry v. Commerce Loan Co.*, 383 U.S. 392, 394 (1966); see also *In re Perry*, 272 F. Supp. 73, 77 (D. Me. 1967) ("[T]he idea of a program for the amortization of personal debts was conceived in 1931, as one of the developments of the Donovan investigation of bankruptcy conditions in New York City in 1929 . . ."); *In re Scher*, 12 Bankr. 258, 261 (Bankr. S.D.N.Y. 1981) ("When Congress saw fit during the final years of the last century and the first 79 years of this one to focus its attention on the plight of the financially pressed wage-earner, it was not writing on a clean slate."). See generally Countryman, *supra* note 9 (tracing the historical development of provisions relating to individual debtors).

⁴⁴ It is in the Bankruptcy Act of 1898 that we see the first clear-cut effort to consider the difficulties of wage earners in a manner separate from and better than that available to other debtors. The Act provided for voluntary and involuntary filings. See Bankruptcy Act of 1898, ch. 541, § 4, 30 Stat. 544, 547. When one recognizes that our first bankruptcy law had no provisions for involuntary bankruptcy, this provision takes on added significance. The import of the provision is enhanced by the recognition that the Bankruptcy Act of 1867, ch. 176, § 39, 14 Stat. 517, 536, permitted involuntary proceedings against "any person," including farmers and laborers. In contrast, the Bankruptcy Act of 1898 expressly provided that no involuntary proceeding could be commenced against a wage earner. See Bankruptcy Act of 1898, ch. 541, § 4(b), 30 Stat. 544, 547. The term "wage earner" in the 1898 Act was defined as "an individual who works for wages, salary or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." See Bankruptcy Act of 1898, ch. 541, § 1(a)(27), 30 Stat. 544, 545. Although wages due to laborers, clerks, or servants were entitled to priority under § 64(b)(4), 30 Stat. at 563, the term "wage earner" only appears for substantive purposes in § 4(b), 30 Stat. at 547. One has to suppose that the effort to limit the filing of involuntary proceedings against wage earners—in direct contrast to the Act of 1867—reflects a congressional policy of according special treatment to wage earners.

⁴⁵ See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); see also *In re Johns-Manville Corp.*, 36 Bankr. 727, 736 (Bankr. S.D.N.Y. 1984) (quoting *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, pt. 2, 93d Cong., 1st Sess. 75, 79 (1977)) ("A 'principal' goal of the Bankruptcy Code is to provide 'open access' to the 'bankruptcy process.' . . . The rationale behind this 'open access' policy is to provide access to bankruptcy relief which is as 'open' as 'access to the credit economy.'"); HOUSE REPORT, *supra* note 21, at 94, 120; Countryman, *supra* note 9, at 817 (quoting with approval *Local Loan Co.*, 292 U.S. at 244).

With the virtual abolition of debtor's prisons, where one was punished simply for being a debtor,⁴⁶ our bankruptcy laws have struggled to permit an individual to repay debts without being stripped of dignity. Preservation of self-worth has been a prized value—if a debtor's self-respect can be preserved throughout a case, it has been argued, the individual debtor will have the incentive to begin a new life and to reestablish herself as a productive member of society.⁴⁷

Individual debtor protection has taken a variety of forms over the years. The ability to obtain a discharge—a release of all prepetition indebtedness—and to retain exempt property—assets that cannot be reached by one's creditors—has been the mainstay of debtor protection. However, the effort to preserve a debtor's dignity also can be seen in other bankruptcy provisions. Chapter 13 (formerly Chapter XIII)⁴⁸ was designed, for example, to provide a simple, cost-efficient way to encourage debtors to repay their creditors over time without the perceived stigma of a liquidation proceeding.⁴⁹ In part, the theory behind Chapter 13 is that if a debtor voluntarily chooses to repay her creditors from future income, as opposed to being ordered to repay them, the likelihood of payment will in fact increase.⁵⁰ The ever-expanding defi-

⁴⁶ See Countryman, *supra* note 9, at 814; Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 32-34 (1926); Nehemkis, *The Boston Poor Debtor Court*, 42 YALE L.J. 561, 578 (1933).

⁴⁷ See *Local Loan Co.*, 292 U.S. at 244; *Williams v. United States Fidelity Co.*, 236 U.S. 549, 549-54 (1914); see also T. JACKSON, *supra* note 1, at 1447 ("[A] nonwaivable right of discharge protects the individual from his own impulsive or biased decisions that lead him to overconsume credit, and it protects others from the externalities produced by these decisions."); BROOKINGS STUDY, *supra* note 34, at 197 ("[W]e have seen that bankruptcy is inevitable and necessary. The process ends a deteriorating but unresolved situation so that those involved can make a fresh start."); Kronman, *supra* note 14, at 785 ("The right to a discharge is usually justified in terms of the debtor's need for a fresh start, unhampered by earlier debts.").

⁴⁸ Act of June 22, 1938, ch. 575, §§ 601-686, 52 Stat. 840 (codified at 11 U.S.C. §§ 1001-1086), *repealed by* Bankruptcy Act of 1978, Pub. L. No. 95-598, title IV, §§ 401(a), 402(a), 92 Stat. 2682.

⁴⁹ See REMINGTON ON BANKRUPTCY § 3747, at 418-19 (J. Henderson 6th ed. 1955); see also *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966) ("[Chapter XIII] gave—and was intended to give—to the wage earner a reasonable opportunity to arrange installment payments to be made out of future earnings."); *In re Scher*, 12 Bankr. 258, 262-63 (Bankr. S.D.N.Y. 1981) ("Chapter XIII was framed to permit the wage earner . . . to pay his creditors from his future wages as earned.").

⁵⁰ See HOUSE REPORT, *supra* note 21, at 120; see also Warren, *supra* note 5, at 1336 (criticizing theory that the Bankruptcy Reform Act of 1978 failed to achieve Congress's goal of promoting more substantial repayment of debt under Chapter 13).

It should be noted that § 727(a)(8) was not enacted in the manner contained in the Senate bill, S. 2266, 95th Cong., 1st Sess. (1977). Rather, § 727(a)(9), as enacted, contemplates that a debtor could get a discharge in a Chapter 7 case, even if she had filed a Chapter 13 case within the previous six years, if payments under the plan in the previous case totaled at least 100% of the allowed unsecured claims in that case, or 70% of such claims, and if the plan was proposed in good faith and represented the debtor's

nition of "wage earner" (the person entitled to relief under Chapter 13) suggests the importance placed over the years on offering individuals in financial trouble an opportunity to restructure their prior obligations.⁵¹

The dramatic growth of consumer credit subsequent to World War II and the consequent increase in the volume and complexity of financial problems of individual debtors rapidly eclipsed the adequacy of the pre-Code provisions to achieve their objectives.⁵² For example, courts handled confirmation of Chapter XIII cases differently from jurisdiction to jurisdiction and the effort to create simple, cost-efficient methods of relief for debtors faltered.⁵³ Accordingly, in 1968, Congress began active consideration of a complete revision of the federal bankruptcy laws.⁵⁴ At the heart of this effort was a congressional bias in favor of preserving and promoting the rights of individual debtors and encouraging them to utilize the federal bankruptcy system to achieve a

best effort. See 11 U.S.C. § 727(a)(9) (1982). For a recent case encouraging the use of Chapter 13, see *In re Lepper*, 58 Bankr. 896, 903 (Bankr. E.D. Mich. 1986).

⁵¹ The term "wage earner" was expanded at various times over the years prior to the passage of the Code in 1978. For example, in 1938, the term "wage earner" was defined as "an individual who works for wages, salary, or hire . . . which, when added to all his other income, does not exceed \$3600 per year." See Bankruptcy Act, ch. 575, § 606(8), 52 Stat. 840, 931 (1938). Interestingly, for the purpose of limiting who could be put into an involuntary case, the Act retained the limitation of \$1500 with respect to wage earners. Thus, the definition of wage earner that appeared in the Bankruptcy Act of 1898, ch. 541, § 1(a)(27), 30 Stat. at 842, for purposes of § 4(b), 30 Stat. at 547, differed from that contained in § 606(8), 30 Stat. at 931. See *supra* note 44 and accompanying text. According to a text prepared in 1938 on the Chandler Amendments, "[t]he new figure [\$3600] is not entirely arbitrary; it is a fair approximation, in the light of experience with wage earner bankruptcies under the old Act, at a line of demarcation which will be likely to reach the wage earners most in need of the relief of this chapter." J. WEINSTEIN, *THE BANKRUPTCY LAW OF 1938*, at 337 (1938). The term "wage earner" was amended in 1950 to raise the ceiling on wages earned for purposes of Chapter XIII to \$5000. See Act of December 29, 1950, 64 Stat. 1134. In 1959, the statute was again amended, this time deleting any monetary ceiling with respect to Chapter XIII; the only requirement was that the debtor be a wage earner, which was defined as an individual "whose principal income is derived from wages, salary or commissions." See Act of May 13, 1959, 73 Stat. 24; see also 9 REMINGTON ON BANKRUPTCY, *supra* note 49, at § 3748 (J. Henderson ed. 1955 & Supp. 1978) (discussing, *inter alia*, meaning of "wage earner").

⁵² See H.R. DOC. NO. 137, 93rd Cong., 1st Sess., pt. 1, at 33 (1973), which stated: "The largest cause of public concern about the Bankruptcy Act since the Chandler Act revisions at the end of the 1930's has stemmed from the enormous increase in the number of Act cases during the quarter century that has followed World War II." *Id.* Moreover, the adoption of the Uniform Commercial Code in most jurisdictions also created interpretive difficulties both within and outside the bankruptcy context.

⁵³ See *id.* at 157. "Although the use of . . . [Chapter 13] does seem to predominate in certain parts of the country, diversity in use can be found among states in the same geographical region . . . and there is a surprising variety in the usage of the Act among individual residents in the same state." *Id.*

⁵⁴ For a comprehensive discussion of the legislative history of the Bankruptcy Act of 1978, see Klee, *supra* note 21.

fresh start.⁵⁵ The resulting legislation—the Bankruptcy Reform Act of 1978—substantially simplified the procedures for individual debtor recourse to bankruptcy relief and, despite the consumer credit industry's considerable opposition, expanded the rights of and protections accorded to individual debtors under the federal bankruptcy laws.⁵⁶

The six year period between adoption of the Code and the Consumer Credit Amendments was marked by several important but somewhat self-contradictory developments. The consumer credit industry, despite its stated conviction that the Code had improperly shifted the balance of rights in favor of individual debtors,⁵⁷ intensified its marketing efforts to increase consumer borrowing.⁵⁸ As double digit inflation fueled the needs of consumers to borrow, rising interest rates encouraged creditors to lend.⁵⁹ Added to the growth of the total volume of consumer credit and the resulting mounting interest burden was the dramatic increase in unemployment.⁶⁰ The inevitable consequence was an upsurge in individual debtor loan defaults and recourse by individual debtors to the federal bankruptcy laws.⁶¹

The reaction of the consumer credit industry was predictable. Despite its continued promotion of consumer credit and the existence of

⁵⁵ For a discussion of the fresh start policy, see *supra* notes 1-14 and accompanying text.

⁵⁶ See Biery, *Debt Adjustment Under Chapter 13 of the Bankruptcy Reform Act of 1978*, 11 ST. MARY'S L.J. 473, 474 (1979); Chatz, Costello & Gross, *An Overview of the Bankruptcy Code*, 84 COM. L.J. 259, 259 (1979); Cohen & Klee, *Caveat Creditor: The Consumer Debtor Under the Bankruptcy Code*, 58 N.C.L. REV. 681, 681 (1980).

⁵⁷ See *Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 452, 453 (1983) [hereinafter *Hearing*]; Warren, *supra* note 5, at 1333.

⁵⁸ See *Hearing*, *supra* note 57, at 493 (chart reflecting increase in amount of consumer credit outstanding).

⁵⁹ See Schuchman & Rhorer, *Personal Bankruptcy Data for Opt-Out Hearings and Other Purposes*, 56 AM. BANKR. L.J. 1, 2 (1982) (noting that, in August of 1981, consumer installment credit totaled \$324.65 billion, an increase of 6.2% from one year earlier) (quoting Wall St. J., Oct. 8, 1981, at 8, col. 1); see also Noble, *Bankruptcies Soaring as High Interest Rates Cause Cash Shortages*, N.Y. Times, Mar. 30, 1981, at 1, col. 1 (attributing rising rate of bankruptcy to the 1980 recession, the increase in the demand for credit, and the rise of interest rates).

⁶⁰ See Note, *Filing for Personal Bankruptcy: Adoption of a "Bona Fide Effort" Test Under Chapter 13*, 14 U. MICH. J.L. REF. 321, 321 (1981) (chart showing relationship between unemployment, inflation, Gross National Product, and bankruptcies). For a discussion of the effect of unemployment as well as other economic factors on the rate of individual debtor failures, see Shepard, *Personal Failures and the Bankruptcy Act of 1978*, 27 J.L. & ECON. 419, 430-34 (1984).

⁶¹ In general terms, the total number of bankruptcy filings rose from approximately 250,000 in 1975 to 520,000 in 1982. See T. EISENBERG, *DEBTOR AND CREDITOR* LAW 438-39 (1984); see also Schuchman & Rhorer, *supra* note 59, at 1 (noting a constant increase in the per capita frequency of personal bankruptcy filings since World War II).

statistics demonstrating that the actual number of individual debtor filings under the Code as a percentage of total credit dollars extended had not increased, the industry continued to criticize the enhanced individual debtor protection provisions of the Code.⁶² The post-Code experience had merely intensified the credit industry's resolve. Its representatives argued that the Code's liberalized exemptions, expanded discharge provisions, and diminished Chapter 13 entry-level requirements were responsible for the proliferation of bankruptcy filings by individual debtors.⁶³ The industry argued that those individuals filing for relief under Chapter 7, many of whom had no non-exempt assets, were obtaining discharges from indebtedness that could have been repaid in major part under Chapter 13. The credit industry further suggested that those debtors who did utilize Chapter 13 were obtaining confirmation of plans that allowed them to pay less than they were capable of paying on an ongoing basis, and that they were receiving relief through the broadbased discharge provisions in Chapter 13 from prefilings in indebtedness that would be nondischargeable in a Chapter 7 proceeding.⁶⁴ Bolstered by media attention to the rising rate of bankruptcies and by the apparent ability of individual debtors to avoid their obligations through the bankruptcy laws,⁶⁵ the industry maintained that its recoveries were unnecessarily diminished solely because abusive debtors were manipulating the Code to their advantage.⁶⁶

The consumer credit industry's lobbying efforts prompted various legislative proposals following passage of the Code that predated the

⁶² For a summary of the credit industry's criticism of the Code, see *Hearing*, *supra* note 57, at 486-493; see also Countryman, *supra* note 9, at 822-26 (criticizing assumptions used in Purdue study, PURDUE UNIVERSITY CREDIT RESEARCH CENTER, CONSUMER BANKRUPTCY STUDY (1981) [hereinafter PURDUE STUDY], reprinted in *Senate Hearings*, *supra* note 5, at 23); Sullivan, Warren, & Westbrook, *Limiting Access*, *supra* note 37, at 1103-38 (criticizing the design, execution, and analysis of the Purdue Study); Sullivan, Warren & Westbrook, *Rejoinder*, *supra* note 37, at 1101-02 (concluding that the credit industry's own data undermine the claim that limiting access to bankruptcy would result in 1.1 million dollars in savings to creditors and consumers).

⁶³ See *Hearing*, *supra* note 57, at 488-89. But see Sullivan, Warren & Westbrook, *supra* note 10, at 308-09 (noting that credit industry's assumption that all debt is consumer debt fails to recognize the large percentage of business debt owed by individual debtors).

⁶⁴ See *Hearing*, *supra* note 57, at 487.

⁶⁵ See Young, *When Relief Exceeds the Need . . . The "Straight" Bankruptcy Ripoff*, reprinted in *Senate Hearings*, *supra* note 5, at 448. Part of what some members of Congress saw as evidence of abuse were advertisements for bankruptcy relief. See *Senate Hearings*, *supra* note 5, at 113-14, 445-46 (samples of newspaper advertisements from bankruptcy specialists, including one that featured the headline "Provo Couple Gets Free of Debt in Only 24 Hours!").

⁶⁶ See *Hearing*, *supra* note 57, at 488.

Consumer Credit Amendments.⁶⁷ None of these proposals, however, was adopted.⁶⁸ Although the proposals addressed a number of concerns, two are of critical significance to this analysis: the standards for confirmation of a Chapter 13 plan and the entry-level requirements for a Chapter 7 case.

The credit industry focused its attention on one of the most litigated sections of the Code, section 1325(a)(3), which included among the requirements for confirmation of a Chapter 13 plan that it be proposed in good faith.⁶⁹ Although the term "good faith" was by no means new to the federal bankruptcy laws,⁷⁰ courts had conflicting views of its meaning in the context of a Chapter 13 plan.⁷¹ Some courts held that a debtor had to make payments at least equal to seventy percent of her outstanding unsecured indebtedness over the term of the plan, while others approved plans involving zero or minimal payments.⁷² Although

⁶⁷ See S. 445, 98th Cong., 1st Sess. (1983); S. 2000, 97th Cong., 1st Sess., reprinted in 127 CONG. REC. S15,712 (daily ed. Dec. 16, 1981), amended by 97th Cong., 2d Sess. (1982); H.R. 4786, 97th Cong., 1st Sess. (1981); see also Ginsberg, *The Proposed Bankruptcy Improvement Act*, supra note 37, at 1 n.1 (discussing bills proposed by Senators Dole and Butler that sought, among other things, to restructure bankruptcy and other federal courts); Ginsberg, *Update*, supra note 37 (examining the consumer credit amendments proposed in the Omnibus Bankruptcy Improvements Act of 1983).

⁶⁸ See Ginsberg, *Update*, supra note 37, at 248.

⁶⁹ See 11 U.S.C. § 1325(a)(3) (1982) (providing that the court shall confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law").

⁷⁰ See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 550 (current version at 11 U.S.C. § 1325(a)(3) (1982)), which read, in relevant part: "The judge shall confirm a composition if satisfied that . . . the offer and its acceptance are in good faith."

⁷¹ See Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 275 n.17 (1981) ("There is nothing in Chapter 13 itself or in its legislative history to support, much less prompt, the various unprecedented interpretations given 'good faith' by the majority of courts to date."); see also Note, *Bankruptcy: Good Faith and the Zero Payment Plan in Chapter 13*, 69 KY. L.J. 327, 344 (1981) ("A number of courts have remained unconvinced that good faith requires some minimum payment to unsecured creditors under Chapter 13."). For a summary of several cases on § 1325(a)(3), see Ordín, *The Good Faith Principle in the Bankruptcy Code*, 38 BUS. L.J. 1795 (1983).

⁷² For examples of cases applying the 70% standard, see *In re Burrell*, [1978-81 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 67,382 (Bankr. N.D. Cal. 1980), rev'd, [1983-84 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 69,062 (N.D. Cal. 1982); *In re Heard*, 6 Bankr. 876, 882 (Bankr. W.D. Ky. 1980); *In re Raburn*, 4 Bankr. 624 (M.D. Ga. 1980). As suggested by some of the courts adopting the 70% standard, the 70% standard might be rooted in § 727(a)(9), which limits the rights of a debtor to obtain a discharge in Chapter 7 if within the prior six years she has obtained a discharge in Chapter 13. Under § 727(a)(9), the debtor can avoid such a limitation if the Chapter 13 plan provides creditors with 100% payment of the allowed unsecured claims or creditors received payments equal to 70% of their claims, and if the plan is proposed in good faith and represents the debtor's best effort. See 11 U.S.C. § 727(a)(9) (1982).

For examples of cases permitting zero or minimal payments, see *Barnes v. Whe-*

many courts examined the debtor's future earning capability, it was but one of many factors considered. The inconsistent results of the application of section 1325(a)(3) spawned a number of proposals suggesting that the present good faith requirement be augmented by a further requirement that a Chapter 13 plan represent the debtor's "ability to pay," "bona fide effort," or "good faith effort."⁷³ Irrespective of language differences, all of these proposals reflected one common theme, namely that a Chapter 13 plan ought not to be confirmed unless the debtor manifested a serious effort to repay her creditors, as opposed to a mere good faith proposal in the plan to do so.⁷⁴ Various accompanying committee reports indicate that these suggested reforms were designed not to *change* bankruptcy policy but merely to *clarify* it.⁷⁵ These reforms would have done more, however, than merely clarify. The focus of these reforms differed from that of the Code by considering the debtor's future income as the essential criterion, rather than merely as one of several criteria, for determining repayments under a Chapter 13 plan.

Concern with the entry-level requirements for a Chapter 7 case was reflected in a Senate proposal that would have precluded an individual debtor from filing a Chapter 7 case if the debtor would have been able to repay a reasonable portion of her indebtedness out of future income.⁷⁶ This standard, dubbed the "future income test," was subject to considerable criticism. As noted by Senators Metzenbaum and Kennedy, because the proposal conditioned the availability of relief under Chapter 7 on the amount of a debtor's future income, it "represented a radical departure" from the tradition of according individuals

lan, 689 F.2d 193 (D.C. Cir. 1982); *In re Rimgale*, 669 F.2d 426 (7th Cir. 1982); *In re Moss*, 51 Bankr. 122 (Bankr. M.D. Tenn. 1980); *In re Faust*, 12 Bankr. 679 (Bankr. D. Neb. 1981); *In re Methvin*, 11 Bankr. 556 (Bankr. S.D. Miss. 1981); see also *In re Green*, 60 Bankr. 547, 551 n.6 (Bankr. C.D. Cal. 1986) (offering a current compilation of these cases).

⁷³ See, e.g., Bankruptcy Amendments Act of 1981, S. 863, 97th Cong., 1st Sess. § 128(b) (1981) (bona fide effort test); S. 658, 96th Cong., 2d Sess. § 128(b) (1980) (good faith effort test); S. REP. NO. 150, 97th Cong., 1st Sess. 18-19 (1981) (ability to pay test).

⁷⁴ See Cyr, *supra* note 71, at 281-88 (comparing the "good faith effort," "bona fide effort," and "ability to pay" tests); Ginsberg, *The Proposed Bankruptcy Improvement Act*, *supra* note 37, at 61-62 (Amendments require that a Chapter 13 debtor demonstrate a "bona fide effort which is consistent with the debtor's ability to repay his debts after providing for himself and his dependents"); LoPucki, "Encouraging" *Repayment Under Chapter 13 of the Bankruptcy Code*, 18 HARV. J. ON LEGIS. 347, 351 (1981) ("This good faith requirement has been a part of Chapter XIII continuously since 1938 . . .").

⁷⁵ See, e.g., H.R. REP. NO. 1195, 96th Cong., 2d Sess. 1-2 (1980).

⁷⁶ See S. 445, 98th Cong., 1st Sess. (1983).

a fresh start.⁷⁷ In various prior suggested changes to the bankruptcy laws, Congress had repeatedly defeated any legislation that took away a debtor's right to liquidate her assets and begin anew.⁷⁸

The defeat of this proposed threshold requirement for Chapter 7 filings did not, however, eliminate further creditor efforts at "reform."⁷⁹ Notwithstanding a variety of legislative defeats along the way, portions of the credit industry's proposals were adopted by Congress, aided at least in part by several key factors outside the industry's control.⁸⁰ First, in 1982, the United States Supreme Court determined that

⁷⁷ S. REP. NO. 65, 98th Cong., 1st Sess. 90 (1983).

⁷⁸ See *id.* (remarks of Senators Kennedy and Metzenbaum) ("In the name of curing a few well-publicized abuses of the Bankruptcy Code, a well-orchestrated creditor lobby attempted to turn back the clock on basic bankruptcy protections. Instead of a fine-tuned approach designed to weed out possible abuses, creditors attempted a broad assault on our Bankruptcy Code.").

In looking at our bankruptcy history, similar concern was expressed in 1932 when Congress contemplated adding the concept of "suspended discharge" into the law. This legislation proposed, in general terms, that individuals who could repay more than 50% of their indebtedness would not initially get a discharge. Rather, it would be held in abeyance while the debtor paid creditors out of future income and non-exempt property. See *Joint Hearings Before the Subcomms. of the Comms. of the Judiciary on a Uniform System of Bankruptcy*, 72d Cong., 1st Sess. 535, 546-52 (1932) [hereinafter *Joint Hearings*].

This proposed legislation never saw the light of day. In objecting to its passage, the Dade County Bar Association expressed its view that the legislation went "too far" in trying to punish the alleged wrong-doing debtor. As expressed in the Bar Association's report, "the proposed act, in its effort to apprehend the fraudulent merchant, necessarily would prevent many good citizens from starting life anew after an unfortunate failure." *Id.* at 545 (statement of Herbert U. Feibelman).

Herbert U. Feibelman, chairman of the bankruptcy section of the Dade County Bar Association, stated further:

If the bar of this country could be made thoroughly familiar with that provision [suspended discharge], I think a protest would arise that would sound from one end of the country to the other. In my opinion, it is so decidedly un-American as to shock the conscience of anyone who is imbued with the most superficial feeling of liberty.

...
We seem to have gone so far in this country that we are apparently willing to foist upon the public an act that absolutely destroys all exemptions guaranteed under the constitutions of the several states, and that make a free-born American citizen come into court and stultify himself by telling what money he needs for clothing, food and shelter for his family. How far have we gone in this country when Congress will even consider such a proposition as that?

Id. at 546-47.

⁷⁹ See *infra* notes 128-34 and accompanying text.

⁸⁰ The legislation that was passed and supported by the consumer credit industry contained a "compromise" provision with respect to Chapter 7 cases. Interestingly, the legislation adopted the suggestion of the National Bankruptcy Conference with respect to Chapter 13, namely the "disposable income" provisions now found in § 1325(b). See 11 U.S.C. § 1325(b) (1982 & Supp. III 1985); Cyr, *supra* note 71, at 281-85. The irony is that the National Bankruptcy Conference opposed the adoption of § 707(b),

the expanded jurisdiction accorded federal bankruptcy courts under the Code was unconstitutional.⁸¹ The Supreme Court stayed the effect of its 1982 decision until December 24, 1983, in the hope that Congress would adopt a revised bankruptcy court system by that date.⁸² The fact that the court system established under the Code expired by its own terms on March 31, 1984 provided a further incentive for legislative action.⁸³ Nonetheless, Congress did not reach a consensus by December 1983 and, in fact, was forced to extend on various occasions the expiration of the entire court system.⁸⁴ In spite of the delays and ensuing extensions, Congress did feel the need to act quickly in response to the Supreme Court's decision.⁸⁵ Because of the pressure on Congress to pass some type of bankruptcy legislation, various special interest groups saw this period as an ideal time to pressure Congress into adopting their proposals as part and parcel of the changes to the bankruptcy court system.⁸⁶ In short, it was the perfect moment for logrolling.⁸⁷

Second, in 1984, Congress was given added incentive to revise more than the jurisdictional aspects of the Code when, in *NLRB v. Bildisco and Bildisco*,⁸⁸ the Supreme Court permitted a Chapter 11

see 11 U.S.C. § 707(b) (1982 & Supp. III 1985), and had proposed the section on disposable income as an alternative to that section. The consumer credit industry succeeded in convincing Congress to retain both provisions, thereby undercutting the original intent of what is now § 1325(b).

⁸¹ See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982); see also Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh From the Anvil*, 89 COM. L.J. 317, 318-22 (1984) (summarizing jurisdiction, judges, and procedures under the Code subsequent to the *Marathon* decision); Miller & Bienenstock, *Bankruptcy Restructuring Promises Few Reforms*, LEGAL TIMES, July 30, 1984, at 30.

⁸² See *Marathon*, 458 U.S. at 88.

⁸³ The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, title IV, § 404, 92 Stat. 2549, 2683 (as amended in the transition provisions).

⁸⁴ See *Hearing on Northern Pipeline Construction Co. v. Marathon Pipe Line Co. Decision Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3 (1983) [hereinafter *Marathon Hearings*] (statement of Senator Heflin) (summarizing the various extensions). For a summary and critique of the resulting rules, see King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675 (1985).

⁸⁵ See *Marathon Hearings*, *supra* note 84, at 5 (statement of Senator Metzenbaum).

⁸⁶ See, e.g., *id.* at 451-513 (submissions from various special interest groups related to consumer credit); *id.* at 514-19 (repurchase agreements); *id.* at 519-94 (shopping center tenancy amendments).

⁸⁷ The term "logrolling" has generally meant mutual aid among politicians, as by reciprocal voting for each other's bills. The effects of this practice are not new to bankruptcy law. For a summary of historical congressional compromising in the context of bankruptcy law, see C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 30-45 (1935).

⁸⁸ 465 U.S. 513 (1984).

debtor to reject unilaterally a collective bargaining agreement.⁸⁹ The decision produced an uproar from organized labor, which argued that debtors would now use Chapter 11 merely to get out from under their allegedly onerous collective bargaining agreements.⁹⁰ While the *Bildisco* case did not involve individual debtors, its result was yet another indication to Congress that the Code had enabled debtors to file for relief at the expense of their creditors.

Third, the political climate in 1984 favored creditors. Unlike the composition of Congress in 1978 when the Code was passed, the House and Senate had become decidedly more conservative in 1984. A conservative Republican President was in office, moreover, as compared to the considerably more liberal Democratic President in office in 1978. With increased congressional and presidential support of the business community and a waning interest in social programs and consumer protection, the credit industry found a sympathetic audience for its concerns.⁹¹

In sum, the confluence of a disastrous economy, a conservative political environment, and pressure created by two Supreme Court decisions, together with some legitimate creditor concerns over the operation of the Code, assisted the credit industry in successfully lobbying for major changes in the treatment of individual debtors. While many commentators expressed concerns that the severity of debtor abuse was not nearly as great as that portrayed by the credit industry and that this level of abuse did not require massive changes to the Code,⁹² Congress's capitulation to the creditors' position is no surprise.

⁸⁹ See *id.* at 532-34; see also Note, *The Rejection of Collective Bargaining Agreements in Chapter 11 Reorganizations: The Need for Informed Judicial Decisions*, 134 U. PA. L. REV. 1235, 1238-43 (1986) (summary of the Supreme Court's decision in *Bildisco* and a description of Congress's response to that decision).

⁹⁰ Because rehabilitation is the paramount goal of Chapter 11, see *In re Pine Lake Village Apt. Co.*, 16 Bankr. 750, 753 (Bankr. S.D.N.Y. 1982), companies that are in financial difficulty have not found it extraordinarily difficult to satisfy the tests under 11 U.S.C. § 1113 (1982). These tests reflected an effort to balance the needs of debtors and creditors alike, following what was perceived as the decidedly "anti-labor" effect of the *Bildisco* decision. For a summary of the tests under § 1113, see Chatz & Schumm, *supra* note 81, at 327. For recent decisions under § 1113, see *In re Salt Creek Freightways*, 47 Bankr. 835, 838 (Bankr. D. Wyo. 1985); *In re American Provision Co.*, 44 Bankr. 907, 908 (Bankr. D. Minn. 1984). Although § 1113 has not resolved all of the concerns of organized labor, cases like the recent Third Circuit opinion in *In re Wheeling Pittsburgh Steel Corp.*, 791 F.2d 1074, 1089 (3d Cir. 1986), have given new hope to the union cause. For an assessment of the value of § 1113 as a means of protecting collective bargaining agreements, see Note, *supra* note 89, at 1243-52.

⁹¹ See N.Y. Times, Mar. 28, 1984, at 26, col. 1 (asserting that Congress was bowing to special interests led by unions and the consumer credit industry).

⁹² See, e.g., Sullivan, Warren & Westbrook, *supra* note 10, at 308-09; Warren, *supra* note 5, at 1357.

The Consumer Credit Amendments change approximately twenty provisions of the Code⁹³ as well as various Rules of Bankruptcy Procedure⁹⁴ and certain of the Official Bankruptcy Forms.⁹⁵ Some of the Amendments modify existing statutory provisions;⁹⁶ others create entirely new provisions or subsections.⁹⁷ Almost all have substantive impact, even those which purport to be mere procedural changes.⁹⁸ In light of the historical backdrop, it is not surprising that, with few exceptions, the Amendments shift the balance of rights decidedly in favor of creditors.⁹⁹ Because of that shift, virtually all provisions of the

⁹³ See Consumer Credit Amendments, Pub. L. No. 98-353, §§ 301-320, 98 Stat. 333, 352-57 (1984) (codified at and amending 11 U.S.C. §§ 109, 342, 349, 362, 521, 522, 523, 524, 525, 547, 704, 707, 1301, 1302, 1307, 1322, 1325, 1326 & 1329).

⁹⁴ See *id.* § 321, 98 Stat. 357 (amending Bankruptcy Rule 2002).

⁹⁵ See *id.* § 322, 98 Stat. 357 (amending Official Bankruptcy Form No. 1).

⁹⁶ See, e.g., *id.* § 303, 98 Stat. 352 (amending 11 U.S.C. § 349 (1982)); *id.* § 302, 98 Stat. 352 (amending 11 U.S.C. § 342 (1982)).

⁹⁷ See, e.g., *id.* § 312, 98 Stat. 355 (amending 11 U.S.C. § 707 (1982)); *id.* § 317, 98 Stat. 369 (amending 11 U.S.C. § 1325 (1982)). Section 707 was amended by adding a new subsection (b), which contains the provision for dismissal of a Chapter 7 case based on a determination of "substantial abuse." See *infra* text accompanying notes 110-224. For a detailed analysis of the application of § 707(b), see generally Breitowitz, Installments I and II, *supra* note 19.

Section 1325 was amended by adding a new subsection (b), which contains the provision requiring the debtor to propose to pay out all of her monthly disposable income to the creditors under the plan. See *infra* text accompanying notes 225-353.

⁹⁸ An example of a purely procedural change appears in Act of July 10, 1984, Pub. L. No. 98-353, § 314, 98 Stat. 369 (amending 11 U.S.C. § 1302(b) (1982)). That section amends § 1302(b) to provide that the trustee, in addition to other previously enumerated duties, must dispose of monies received in a Chapter 13 case under the regulations issued by the Director of the Administrative Office of the United States Courts. See *id.* For a discussion of procedural changes that have more substantive impact, see *infra* text accompanying notes 135-38.

⁹⁹ See 129 CONG. REC. S5359 (daily ed. April 27, 1983) (statement of Senator Metzenbaum) ("Now I want it understood that I believe S.445, either in its original form or by amendment, because it is identical, still tips the balance unnecessarily in favor of creditors at a most inappropriate time. This is still a creditors [sic] bill."). While the clear majority of the Consumer Amendments are "adverse" to the interests of debtors, there is at least one change that, on its face, negatively impacts on the consumer credit industry. New subsection (h) of 11 U.S.C. § 362 (1982) provides that a willful violation of the automatic stay pursuant to which an individual is injured will result in actual damages and may give rise to punitive damages. See 11 U.S.C. § 362(h) (Supp. III 1985). One other section that might produce an adverse result to creditors is § 109(f), 11 U.S.C. § 109(f) (1982), which prohibits, for one of two specified reasons, a debtor whose case has been dismissed from filing another case for a period of 180 days. This language was included to protect creditors from debtors who became repeat filers. Unfortunately, the wording of this section suggests that, in the interim period of 180 days, the very same debtor could not be the subject of an involuntary case because only persons who can be debtors can be the subject of involuntarys. See 11 U.S.C. § 303 (1982). Under this analysis, a debtor could have a "free ride" for 180 days, let the preference period expire for preselected creditors, and then refile on the 181st day. By this point, assets could have been dissipated and particular creditors preferred with other creditors left without remedy under the very Code that inserted this provision to protect them.

Amendments impinge in some respect on the individual debtor's ability to obtain a fresh start. This result is a natural consequence of shifting the balance of rights between the debtor's desire to obtain a discharge of prefilings indebtedness and her creditors' desire to maximize the recovery of sums due them.

There is, however, a marked difference between shifting the balance of rights between debtor and creditor and entirely eliminating the debtor's side of the balance. An expansive interpretation of the changes effected by the Amendments in sections 707(b), 1325(b), and 1329(a) raises this latter risk. Although the consumer credit industry sought to curtail a variety of specifically identifiable debtor abuses of Chapters 7 and 13, it is noteworthy that the changes to these sections neither explicitly adopted the credit industry's position nor addressed specific debtor abuses.¹⁰⁰ In fact, several proponents of the legislation indicated that the Amendments were designed in large part to remedy the high cost of credit for middle-class America. These proponents based their argument on the theory that the large number of filings and the small amount of distributions to creditors were principal causes of the high consumer interest rates and limited individual access to credit.¹⁰¹ Under such a theory, the Amendments constitute a response

¹⁰⁰ Congressman Gingrich's characterization of the bill is an appropriate one:

I would suggest that political scientists in the future will look on the machine rule by which this bill was drafted, shipped, packaged, and delivered as probably of the quality that former Mayor Daley of Chicago would have admired. This is an example of raw power that was magnificent. It was the old-time politics that Speaker Cannon would have loved.

130 CONG. REC. H1888 (daily ed. March 21, 1984).

¹⁰¹ The argument suggested by several proponents of the Amendments is not persuasive. As a threshold matter, one has to question whether the initial premise of the proponents of the Amendments, namely, that the credit industry will extend credit more freely or cheaply if the Code tightens the standards for obtaining relief in bankruptcy, is correct. Many have argued that there is no trouble obtaining credit in the marketplace. See Note, *Equal Credit for All—An Analysis of the 1976 Amendments to the Equal Credit Opportunity Act*, 22 ST. LOUIS U.L.J. 326, 326 (1978) (noting that two-thirds of all American families use credit for day-to-day expenses). If anything, too much credit already is being extended to people who cannot repay in the first instance. See Countryman, *supra* note 9, at 825 (noting that 28 of those interviewed for the Purdue Study, *supra* note 62, said that credit was "too easy to get"). More importantly, there is no indication that the costs of credit bear a direct correlation to the bankruptcy laws. Credit costs are based, among other factors, on the likelihood of the borrower's repayment—whether within or outside bankruptcy—and what the market will bear. Credit will continue to be expensive if borrowers are willing to pay high sums to get it in the first instance. See N.Y. Times, *supra* note 59, at D8, col. 1 (explaining that large companies are willing to borrow at high interest rates and simply pass costs on to the consumer).

If pending legislation is any indicator of the present thoughts of Congress, there is currently a movement afoot to limit the cost of consumer credit by limiting the interest rates charged by lenders. See N.Y. Times, Jan. 16, 1981, at 22, col. 1 (detailing contro-

to a sense that prior law was unfair to both creditors and nondebtors and that certain debtors should not be entitled to the benefits of the federal bankruptcy laws.¹⁰²

The effort to codify relief from this vague sense of unfairness to creditors and nondebtors yielded an imprecise result that is susceptible to wide interpretive latitude. It is precisely this opportunity for an expansive interpretation that raises the spectre of destruction of the fresh start policy and conflict with the policies underlying the thirteenth amendment, consequences far beyond those that Congress, and even the credit industry itself, envisioned.¹⁰³ As this Article demonstrates, a narrow interpretation of the Amendments gives greater weight to the Code itself, particularly those provisions not changed by the Amendments, and to the philosophy underlying it. Such an approach accords less weight to the host of political, judicial, and economic factors that antedated the adoption of the Amendments and that are, in large part, external to bankruptcy philosophy.

II. SECTION 707(b)

Section 707 of the Code sets forth the bases for dismissal of Chapter 7 cases, whether filed by or against individual or nonindividual debtors.¹⁰⁴ As modified by the Amendments, the section consists of two

versy over proposed bill to limit interest rates on consumer loans in New York State). For example, interest rates on consumer credit card debt are currently between 16 and 21% per annum. Interest rates in the corporate marketplace for creditworthy borrowers are now between 9 and 11%. Creditors are unwilling to lower rates now because they do not need to do so. They are making plenty of money and people are anxious to borrow. It is likely that, upon the first indication that there will be a mass decline in borrowing by credit card customers, the credit industry will lower the rates. See N.Y. Times, Apr. 7, 1980, at 7, col. 1 (showing correlation between increasing demand and increasing costs between 1976 and 1977 for Master Charge). Absent such an indication, however, the credit industry is likely to retain its high borrowing rates (even if repayment improves), unless Congress steps into the picture by enacting debtor protection measures. By such an analysis, it becomes evident that there is no reason to believe that restricting the debtor's ability to obtain a discharge will change one iota the availability or cost of credit to nondefaulting middle class America.

For a myriad of views on the relationship between the cost of credit and amendments to the bankruptcy laws, see generally *The Economics of Bankruptcy Reform*, 41 LAW & CONTEMP. PROBS. 1 (1977) [hereinafter *Reform Symposium*].

¹⁰² See Chatz & Schumm, *supra* note 81, at 317 ("Despite the maneuvering in public and behind the scenes, it is fair to say that [the Act] represents a *rational compromise* among *intensely conflicting interests*." (emphasis added).

¹⁰³ See *supra* note 80.

¹⁰⁴ Section 707, as modified by the Amendments, reads as follows (with 1986 amendments in italics):

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

subsections. Subsection (a) is virtually identical to that which previously comprised the entirety of the section. Subsection (b) is entirely new, however, and provides, in pertinent part, that a Chapter 7 case filed by an individual whose indebtedness consists primarily of consumer debts may be dismissed by the court on "its own motion and not at the request or suggestion of any party" if it finds that the granting of relief would be a "substantial abuse" of the provisions of Chapter 7.¹⁰⁵

or

(2) nonpayment of any fees or charges required under chapter 123 of title 28; or

(3) *failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on motion by the United States trustee.*

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707 (1982 & Supp. III 1985), as amended by Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —.

¹⁰⁵ Act of July 10, 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333-55 (codified as amended at 11 U.S.C. § 707(b) (Supp. III 1985)). For further analysis of this section, see generally Breitowitz, Installments I and II, *supra* note 19; see also *In re Campbell*, 63 Bankr. 702, 705 (Bankr. W.D. Mo. 1986); *In re Jones*, 60 Bankr. 96 (Bankr. W.D. Ky. 1986); *In re Whitby*, 51 Bankr. 184, 186 n.1 (Bankr. E.D. Mich. 1985); *In re Christian*, 51 Bankr. 118 (Bankr. D.N.J. 1985), *aff'd*, 804 F.2d 46 (3d Cir. 1986).

One issue of practical import with respect to § 707(b) concerns how a court will become apprised of abuse in the first instance where, as is now the case, creditors are precluded from raising the issue. This issue has been resolved at one level by passage of the Bankruptcy Act of 1986. Under the Act, the United States Trustee program will become virtually a nationwide system. Congress amended § 707(b) in order to permit the Trustee to bring a dismissal motion under the section. Therefore, both the bankruptcy judge and the administrative arm of the bankruptcy process will be able to pursue such an action. Given the phase-in requirements of the United States Trustee system, however, the effect of this change may not be felt for some time.

The issue becomes more complex in view of the bifurcation between the administrative and adjudicative functions in the bankruptcy context when the court brings a 707(b) motion itself. See *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. 4-7 (1973) (summarizing the policies supporting the bifurcation between the administrative and adjudicative functions of the bankruptcy system). One of the purposes behind the Code was to allocate to judges the adjudicative functions alone and to leave case administration to trustees, court administrators, and the Office of the United States Trustee, which was then only in the pilot districts. See *id.* One approach suggested in the recent case law is for judges to undertake an initial review of debt, income, and expense data. See, e.g., *In re Edwards*, 50 Bankr. 933, 934 (Bankr. S.D.N.Y. 1985). Because of the volume of cases that will be reviewed, according to one court, "[c]ertain petitions simply leap out as unusual." *Id.* at 941. The critical question concerns what exactly leaps out—the amount of a debtor's income, the nature of the debtor's expenditures, or the nature of

Subsection (b), unlike subsection (a), is applicable only to a specific class of debtors (individuals) whose debt itself falls within a specific category (consumer debts).¹⁰⁶ Moreover, it attempts to establish a specifically identifiable basis for dismissal of the cases of that narrow debtor class without defining the principal operative term (substantial abuse) upon which dismissal of such petitions can be based.¹⁰⁷ Distinc-

the indebtedness. *Cf. In re Almendinger*, 56 Bankr. 97, 98 (Bankr. N.D. Ohio 1985) (The court noted the difficulties in "being cast in the dual role of adducer as well as arbiter of the evidence in deciding its section 707(b) motion.").

¹⁰⁶ See 11 U.S.C. § 707(b) (Supp. III 1985); *cf. In re Bell*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986) (vacating previous order of dismissal because debts at issue were not consumer debts); *In re Keniston*, 60 Bankr. 742, 744-45 (Bankr. D.N.H. 1986) (noting possible constitutional objections to treating consumer debt differently from other types of debt); *In re Kress*, 57 Bankr. 874, 877 (Bankr. D.N.D. 1985) (noting court discretion to dismiss where consumer debt); *In re Kelly*, 57 Bankr. 536, 538-39 (Bankr. D. Ariz. 1986) (discussing court's discretion in consumer debt cases); *In re Bryant*, 51 Bankr. 729, 731-32 n.1 (Bankr. N.D. Miss. 1985) (examining inconsistencies between the Amendments and other sections of the Code regarding the eligibility and treatment of the term "individuals"); *In re White*, 49 Bankr. 869, 872-73 (Bankr. W.D.N.C. 1985) (interpreting the term "consumer debt").

¹⁰⁷ *In re Bryant*, 47 Bankr. 21, 25-26 (Bankr. W.D.N.C. 1984), was the first case to be decided under the amended § 707. In dismissing Bryant's Chapter 7 petition, the court initiated an expansive interpretation of the term "substantial abuse" by going as far as to examine the debtor's lifestyle and then suggesting that the debtor could possibly make payments pursuant to a Chapter 13 plan. See *id.* at 24. Other courts have utilized different terms to give content to the "substantial abuse" test. See, e.g., *In re Hudson*, 64 Bankr. 73, 75-76 (Bankr. E.D.N.C. 1986) (focusing on debtor's income schedules to find "substantial abuse" and questioning, without defining, debtor's good faith and credibility); *In re Kelly*, 57 Bankr. at 539 ("[T]he Code provides no guidance as to what is meant by the 'substantial abuse' provision under section 707(b) . . ."); *In re Hamze*, 57 Bankr. 37, 39 (Bankr. E.D. Mich. 1985) (noting failure of Congress to delineate "any substantive guidelines to assist [bankruptcy judges] in determining which cases should be deemed abusive"); *In re Bell*, 56 Bankr. 637, 641 (Bankr. E.D. Mich. 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986) (holding that the ability to repay creditors in a Chapter 11 or Chapter 13 plan and the election not to do so was the "primary, if not exclusive, factor" to be considered in determining substantial abuse); *In re Grant*, 51 Bankr. 385, 393-94 (Bankr. N.D. Ohio 1985) (noting several factors to be taken into account in determining substantial abuse, including ability to fund a Chapter 13 plan, bad faith in filing, last minute spree-buying, and catastrophic events that befell the debtor); *In re Edwards*, 50 Bankr. 933, 935-36 (Bankr. S.D.N.Y. 1985) (Although holding that the debtor's petition was not a substantial abuse of the provisions of Chapter 7, the court applied an expansive analysis of the term "substantial abuse" by establishing as the proper yardstick of abuse the possibility of a 100% payment of the principal of the debtor's debts under Chapter 13.); *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985) (finding substantial abuse under § 707(b) where debtors were able to repay 100% of their unsecured debt over a 36 month period while maintaining an appropriate amount of money for miscellaneous living expenses).

Interestingly, in *Bryant* and *Grant*, the debtors not only failed to repay their creditors and spent "excessively," but also they failed either to disclose or to complete the information required by the courts with respect to their assets and liabilities. Therefore, although the courts dismissed these debtors' Chapter 7 cases under § 707(b), these courts had alternative grounds on which to reach the same result. In *Bell*, however, the

tions between classes of debtors and categories of debt exist throughout the Code.¹⁰⁸ The paramount issue in each instance is whether a particular distinction, as well as the consequences thereof, can be justified as consistent with the framework of the Code and bankruptcy philosophy generally. When expansively interpreted, as has been evidenced by the reasoning and, in some instances, the actual holdings of the growing number of cases decided since its adoption,¹⁰⁹ section 707(b) is unjustifiable in terms of both the framework of the Code and bankruptcy policy generally. The development and critique of a paradigmatic expansive interpretation of section 707(b) provide an appropriate starting point in this analysis. This paradigm is then compared to and contrasted with a narrow interpretation of the same provision.

A. *The Expansive Paradigm*

Prior to the adoption of the Consumer Credit Amendments, the lament of the credit industry was, as has been noted, that too many debtors were availing themselves of the relief accorded by the Code and that these debtors should not be entitled to the benefits of a discharge without suffering greater detriment.¹¹⁰ Although they provide no clear objective standards for finding such abuse of the bankruptcy process, the sparse "legislative history" of the Amendments and the more prolific background surrounding prior drafts of the legislation are rife with the same subjective sense that some debtors were abusing the federal bankruptcy laws.¹¹¹

Since the Amendments became effective, several courts appear to have adopted virtually intact the views advanced so vigorously by the consumer credit industry and suggested in the "legislative history." "Substantial abuse" has been interpreted as a fundamentally improper

court's holding could not be premised on such alternate grounds, and the court dismissed the debtor's claim under a clear-cut example of the expansive paradigm.

For an overview of the facts in the *Bryant, Edwards*, and *Grant* cases, see Note, *Congressional Intent and Judicial Response: The Consumer Credit Amendments of the 1984 Bankruptcy Act*, 21 LAND & WATER L. REV. 181, 195-198 (1986).

¹⁰⁸ See, e.g., 11 U.S.C. §§ 109 (establishing who can be a debtor under each chapter), 523 (differentiating between different classes of debt for the purpose of providing exceptions to the discharge provision), 726 (distinguishing between different classes of debts for purposes of priority of distribution of property of the estate), 727 (establishing different classes of debtors in the context of discharge, as a discharge will only be granted to an individual debtor and not a corporate debtor under Chapter 7) (1982).

¹⁰⁹ See *supra* note 107.

¹¹⁰ See *supra* text accompanying notes 64-66.

¹¹¹ See *supra* text accompanying notes 62-92; see also *In re Kress*, 57 Bankr. 874, 877-78 (Bankr. D.N.D. 1985) (discussing legislative history of § 707(b)).

use of the bankruptcy process.¹¹² Courts have found such improper use where the debtor decides to file for relief under Chapter 7 even though she is fully capable of repaying all or a significant portion of her debts out of future income.¹¹³ Under this expansive interpretation of section 707(b), the sine qua non of substantial abuse is the debtor's election not to repay creditors when it is probable that she could do so out of future earnings.¹¹⁴ As stated by one court, a debtor who could repay creditors at least a significant portion of her indebtedness out of future earnings but who instead seeks a discharge in Chapter 7 "is not suffering from

¹¹² See, e.g., *In re White*, 49 Bankr. 869, 874 (Bankr. W.D.N.C. 1985) (stating that the term "substantial abuse" implies that the debtor has obtained "some kind of an unfair advantage . . . against his creditors"); *In re Bryant*, 47 Bankr. 21, 24 (Bankr. W.D.N.C. 1985) (stating that Congress intended the Bankruptcy Code's discharge provisions as relief for "financially troubled persons," and not as a means for the "unscrupulous" to avoid their creditors).

¹¹³ See, e.g., *In re Hudson*, 64 Bankr. 73, 74-75 (Bankr. N.D. Ohio 1986); *In re Kress*, 57 Bankr. 874, 878 (Bankr. D.N.D. 1985); *In re Bell*, 56 Bankr. 637, 641 (Bankr. E.D. Mich. 1986) *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986); *In re Grant*, 51 Bankr. 385, 394 (Bankr. N.D. Ohio 1985); *In re Edwards*, 50 Bankr. 933, 937 (Bankr. S.D.N.Y. 1985); *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Nov. 21, 1985); *cf. In re Bryant*, 47 Bankr. at 24-26 (not specifically holding that the test for "substantial abuse" was whether a debtor could pay a substantial portion of her debt, but including such a factor in its analysis).

¹¹⁴ See *In re Hudson*, 64 Bankr. at 75 (finding substantial abuse under Chapter 7 where debtors could have supported a Chapter 13 plan without undue hardship on themselves); *In re Kelly*, 57 Bankr. at 540 ("[T]hese debtors have not suffered any unforeseen calamity such as unemployment or serious illness which have [sic] rendered them unable to pay their creditors or entitle them to seek a fresh start under the provisions of Chapter 7."); *In re Bell*, 56 Bankr. 637, 641 (Bankr. E.D. Mich. 1986) ("This court concludes that the primary, if not exclusive, factor to be considered in determining whether a debtor's petition constitutes a substantial abuse of the Bankruptcy Code under § 707(b) is whether the debtor will have sufficient income to repay a meaningful part of his or her debts, within the context of either Chapter 11 or Chapter 13."), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986); *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985) (finding substantial abuse where debtor could repay over a three year period). These cases indicate that the expansive paradigm presents not only a theoretical but also a very real threat indeed. Professor Breitowitz also suggests looking at whether a debtor can repay creditors under a Chapter 13 plan as a basis for dismissing a case under § 707(b). See Breitowitz, *Installment II*, *supra* note 19, at 44 ("[A] court determining the existence of substantial abuse should consider only the percentage or dollar amount of debt that would be paid under a three year chapter 13 plan . . ."). Professor Breitowitz attempts to justify this conclusion by stating: "The debtor may indeed avoid the utilization of all his disposable income . . . by remaining outside of the bankruptcy system . . ." *Id.* at 44. Professor Breitowitz also relies on the "legislative history" of proposed but not enacted legislation and divines from this history that Congress intended "substantial abuse" to relate solely to "the percentage of debt that could be repaid under a chapter 13 plan . . ." *Id.* at 43. For a criticism of this view, see *In re Deaton*, 65 Bankr. 663, 664-65 (Bankr. S.D. Ohio 1986) (refusing to find substantial abuse even though debtor could have filed Chapter 13 plan).

sufficient economic hardship to warrant use of Chapter 7."¹¹⁵ A similar sentiment was expressed by another court, which observed that "it was not the design of the bankruptcy laws to allow [a] [d]ebtor to lead the life of Riley while his creditors suffer on his behalf."¹¹⁶ This approach is stated even more emphatically when one court noted that its conclusion to dismiss under section 707(b) rested "upon the simple judgment that it is unfair and inequitable for a debtor to request that this Court discharge his debts while he accumulates substantial disposable income over the next several years while living a relatively high life style."¹¹⁷

This approach notwithstanding, there is nothing in the Code or in underlying bankruptcy philosophy that provides a persuasive basis for the view that the hardship to be suffered by the debtor on a go-forward basis is the determinant of whether such a debtor can obtain a Chapter 7 discharge or for the view that, in essence, there is a quantifiable economic "price" that a debtor must pay to obtain relief from prefiling indebtedness.¹¹⁸ Certainly, there is no basis for imposing any such criteria solely upon the individual debtor burdened primarily with consumer debts. Indeed, the legislative history of the Code suggests that the term "consumer debt," which is defined as debt incurred by an individual primarily for personal, family, or household purposes is derived from various statutes intended to *protect* the consumer from various abusive practices by creditors, and that the use of the term or its definitional components in the Code, other than in the context of section 707(b), is fully consistent with an approach that emphasizes consumer protection.¹¹⁹

The theory behind an expansive interpretation of substantial abuse is highlighted when the paradigm is stated somewhat differently. Both the Code and the Amendments stress the importance of apprising debtors of the differences between a filing under Chapter 7 and a filing under Chapter 13.¹²⁰ An operating premise in the Code's treatment of

¹¹⁵ *In re Edwards*, 50 Bankr. at 937.

¹¹⁶ *In re Bryant*, 47 Bankr. at 26.

¹¹⁷ *In re Bell*, 56 Bankr. at 643.

¹¹⁸ See L. KING & M. COOK, *supra* note 2, at 777.

¹¹⁹ The term "consumer debt" is defined in 11 U.S.C. § 101(7) (1982). The legislative history of this section indicates that the definition is adopted from the definition used in various consumer protection laws. See HOUSE REPORT, *supra* note 21, at 309. Other sections in the Code using the term "consumer debt" in a protective manner include 11 U.S.C. § 522(f) (1982 & Supp. III 1985); 11 U.S.C. § 722 (1982); see also *In re Bell*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986) (distinguishing sums expended with profit motives from "consumer" debt); *In re Kress*, 57 Bankr. 874, 877 (Bankr. D.N.D. 1985) (applying the § 101(7) definition of consumer debt to § 707(b) context); *In re Almendinger*, 56 Bankr. 97, 99 (Bankr. N.D. Ohio 1985) (sums expended with profit motive not consumer debts).

¹²⁰ See 11 U.S.C. § 342(b) (Supp. III 1985) (requiring the clerk to give notice to

individual debtors has been that if individuals are fully informed as to the benefits of a Chapter 13, they will choose to reorganize rather than liquidate.¹²¹ If an individual makes such an election, she will have the rights of the expanded Chapter 13 discharge and, particularly under the Amendments, creditors will get more than they would have gotten in a Chapter 7 case.¹²²

The expansive archetype of section 707(b) takes this emphasis on a debtor's choosing Chapter 13 over Chapter 7 one step further. Expansively interpreted, substantial abuse under section 707(b) implies the failure on the part of an individual consumer debtor to proceed under Chapter 13, where all of her future earnings would be available to repay her outstanding indebtedness.¹²³ Although the recent case law has not gone as far as to hold that a debtor must actually file a Chapter 13 case if she is able to repay her creditors,¹²⁴ courts have left the distinct impression that this is the case.¹²⁵

an individual with primarily consumer debts of the various chapters under which such individual may file); 11 U.S.C. § 1325(a)(4) (1982 & Supp. III 1985); Official Form 1, Exhibit B (Supp. III 1985) (requiring the debtor's attorney to attest to the fact that she advised the debtor of the advantages of each chapter available to such debtor).

¹²¹ See HOUSE REPORT, *supra* note 21, at 331-32; see also Sullivan, Warren & Westbrook, *supra* note 10, at 311-20 (assessing debtors' ability to pay).

¹²² See SENATE REPORT, *supra* note 21 at 13 ("[Successfully completed Chapter 13 plans have] provided great self-satisfaction and pride to those debtors who complete them and at the same time effect a maximum return to creditors."); HOUSE REPORT, *supra* note 21, at 122-23 (stating that a Chapter 13 plan must pay creditors more than they would have received had the debtor liquidated under Chapter 7 if a plan is to be approved).

¹²³ *In re Bell*, 56 Bankr. 637, 641-42 (Bankr. E.D. Mich. 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986), suggests that a court in determining whether substantial abuse exists should also look to whether an individual is able to reorganize under Chapter 11. In *Bell* the debtor's obligations exceeded the statutory entry-level requirements for Chapter 13, and, hence, the court looked at whether the debtor could have reorganized under Chapter 11. See *id.* at 642. The *Bell* court's approach would have eliminated the interpretive difficulties encountered by the court in *In re Mastroeni*, 56 Bankr. 456, 459 (Bankr. S.D.N.Y. 1985). In *Mastroeni*, the court found that the debtor was ineligible for reorganization under Chapter 13 and found Chapter 11 relief an unacceptable alternative. The court therefore allowed the debtor's Chapter 7 petition to proceed, despite its conclusion that the debtor—who earned \$73,000 a year in income—could pay back most of his debts. See *id.* For the text of § 1325(b), see *infra* note 227.

¹²⁴ Several courts have gone out of their way to avoid dismissing a Chapter 7 case based solely on a debtor's eligibility for relief under Chapter 13, primarily to preserve the debtor's choice of bankruptcy relief. See, e.g., *In re Deaton*, 65 Bankr. 663, 664-65 (Bankr. S.D. Ohio 1986); *In re Mastroeni*, 56 Bankr. 456, 459 (Bankr. S.D.N.Y. 1985); *In re Edwards*, 50 Bankr. 933, 939 (Bankr. S.D.N.Y. 1985).

¹²⁵ One could argue that the courts in these cases concluded that the combination of a debtor's ability to repay her creditors through a Chapter 13 plan and her deliberate choice not to do so in and of itself constituted substantial abuse. See, e.g., *In re Hudson*, 64 Bankr. 73, 75 (Bankr. N.D. Ohio 1986); *In re Grant*, 51 Bankr. 385, 394 (Bankr. N.D. Ohio 1985); *In re Edwards*, 50 Bankr. at 937; *In re White*, 49 Bankr.

Recent Chapter 7 case law indicates that, in addition to looking to the availability of Chapter 13 to test whether there has been substantial abuse, courts should also look to Chapter 13 to determine whether a debtor could satisfy that chapter's confirmation requirements.¹²⁶ Because Chapter 13 is oriented toward debtors who have income with which to pay creditors, the standard for relief under Chapter 7 implies a "forced" reorganization. Such a reorganization runs contrary to the Code's express prohibition of the enforcement of a debtor's waiver of her right to convert a Chapter 13 case to a Chapter 7 case, a provision that encourages debtors to liquidate if they do not want to reorganize.¹²⁷

1. Consequences of the Expansive Paradigm

If the expansive paradigm continues to be adopted by courts, whether in holding or dicta, then the credit industry will achieve indirectly what they would not convince Congress to adopt directly, namely a threshold entry-level standard for utilization of Chapter 7 by individual debtors.¹²⁸ Under section 109 of the Code, which was unchanged by the Amendments, any person, including an individual, can be a debtor under Chapter 7 unless she falls within one of several limited exceptions, none of which apply to consumer debtors and none of which are predicated upon anticipated income.¹²⁹ Nothing in the Code mandates that a debtor be insolvent to file for relief; a solvent person may determine that she needs relief from indebtedness under Chapter 7.¹³⁰ Nothing in the language of the Code prohibits a debtor's election to discharge her debts by liquidating her non-exempt assets in lieu of making continuous payment to creditors over an extended period of time.¹³¹

869, 874 (Bankr. W.D.N.C. 1985); *In re Bryant*, 47 Bankr. 21, 25-26 (Bankr. W.D.N.C. 1985).

¹²⁶ See, e.g., *In re Kress*, 57 Bankr. 874, 878 (Bankr. D.N.D. 1985); *In re Grant*, 51 Bankr. at 385; *In re Bryant*, 47 Bankr. at 25. But see *In re Deaton*, 65 Bankr. at 664-65 (criticizing *Kress*).

¹²⁷ The debtor may convert a Chapter 11 case to a Chapter 7 case at any time. Any waiver of the right to convert under this subsection is unenforceable. See 11 U.S.C. § 1307(a) (1982); see also *In re Penland*, 11 Bankr. 522, 524 (Bankr. N.D. Ga. 1981); *In re Doyle*, 11 Bankr. 110, 111 (Bankr. E.D. Pa. 1981).

¹²⁸ See *In re Deaton*, 65 Bankr. 663, 664-65 (Bankr. S.D. Ohio 1986).

¹²⁹ Railroads, domestic insurance companies, banks, savings and loan associations, credit unions, and industrial banks and their foreign equivalents are not permitted relief under Chapter 7. See 11 U.S.C. § 109(b) (1982).

¹³⁰ Neither 11 U.S.C. § 301 (1982), which governs the filing of voluntary petitions, nor 11 U.S.C. § 109 (1982), which defines who can be a debtor under each of the chapters, requires that the individual be insolvent or generally unable to pay her debts.

¹³¹ Section 109(b) governs who may file under Chapter 7. Section 109(e) governs

The fact that the issue of whether a debtor is paying her debts is raised only in the context of an involuntary case reinforces these observations. The test of solvency in that context is to protect the debtor from those creditors who may seek to recover sums owed them by unnecessarily forcing a debtor into a bankruptcy case.¹³² Although courts have read into the Code a good faith requirement, applicable to all chapters of the Code, on the part of debtors in filing cases, this requirement has been liberally construed by most courts in order to accord a debtor access to relief at the earliest possible time in the course of her dealings with her creditors.¹³³

Expansively interpreting section 707(b) to impose on a consumer debtor a future income standard for access to Chapter 7 is inconsistent, then, with the language of section 109. Indeed, had the text of the Amendments as finally presented to Congress included a narrowing of the scope of eligible debtors under section 109, such a change would probably not have survived because Congress had previously rejected a

eligibility for relief under Chapter 13. *See* 11 U.S.C. § 109 (b), (e) (1982). It should be noted that although nothing in the Code precludes a debtor from choosing to liquidate rather than reorganize, the Code may preclude an individual from reorganizing within Chapter 13 if such debtor's debts exceed the monetary limits set out in § 109(e) for filing a Chapter 13 petition. *See* 11 U.S.C. § 109(e) (1982) (setting limits of \$100,000 in unsecured debt and \$350,000 in secured debt); *cf. In re Mastroeni*, 56 Bankr. 456, 459 (Bankr. S.D.N.Y. 1985) (observing that certain interpretive difficulties arise from the debt limits in Chapter 13). Chapter 7 has no such monetary limit on the debtor's allowable amount of debt. For an interesting decision on how to determine a debtor's eligibility for relief under Chapter 13, see *In re Crescenzi*, 54 Bankr. 557 (Bankr. S.D.N.Y. 1985).

¹³² *See* 11 U.S.C. § 303 (1982 & Supp. III 1985). It should also be noted that § 303 was amended in 1984 to provide more debtor protection by limiting the circumstances under which a creditor or creditors can put a debtor involuntarily into bankruptcy. Section 303(b)(1) was amended by the addition of the words "or the subject [of] a bona fide dispute." These words were also added to subsection (h)(1) to indicate that in the case of an involuntary petition, it must be shown that debts subject to a bona fide dispute are not to be included in the calculation of whether or not the debtor is regularly paying her debts. *See* Act of July 10, 1984, Pub. L. No. 98-353, § 426, 98 Stat. 333, 359 (codified at 11 U.S.C. § 303(h)(i) (Supp. III 1985)). The "generally not paying" standard is distinct from insolvency. The Code defines insolvency as balance sheet insolvency. *See* 11 U.S.C. § 101(29) (Supp. III 1985). Thus, a debtor need not be insolvent in this sense to be subjected to an involuntary filing.

¹³³ For an examination of the different contexts in which courts have "read in" a requirement of good faith, see Ordín, *The Good Faith Principle in the Bankruptcy Code: A Case Study*, 38 BUS. LAW. 1795 (1983), reprinted in H. MILLER, BANKRUPTCY REORGANIZATION 102-157 (1983); *see also In re Waldron*, 785 F.2d 936, 939 (11th Cir. 1986) (per curiam) (noting broad definition of good faith applicable to various sections of the Code); *In re Johns-Manville*, 36 Bankr. 727, 737-38 (Bankr. S.D.N.Y. 1984) (stating that the good faith requirement should only be used to deny relief to fraudulent debtors).

proposed draft of the Amendments that contained a future income test as a condition to the availability of Chapter 7 to individual debtors.¹³⁴

2. Section 521

The expansive paradigm of denying access to Chapter 7 because of a consumer debtor's anticipated ability to repay creditors over time is facilitated by another of the Amendments. Section 521 has been modified to accelerate the date of the debtor's required disclosure of anticipated income and expenditures.¹³⁵ Armed with this information early in the course of a Chapter 7 case, a court could make a purely quantitative comparative analysis and could conclude, as several courts have suggested, that a substantial excess of projected income over projected expenses constitutes substantial abuse.¹³⁶ Alternatively, a court could evaluate projected expenses as a percentage of income on the basis of statistical formulae such as those provided by the Bureau of Labor Statistics.¹³⁷ A court could also proceed, as some have, to make a qualitative analysis, imposing subjective value judgments on the nature as well as the amount of the debtor's projected expenditures, and by clear inference, her lifestyle.¹³⁸ If expenditures were too high, a court could

¹³⁴ See 130 CONG. REC. S7624 (daily ed. June 19, 1984) (Senator Metzenbaum stated: "I am, therefore, opposed to any consideration of future earnings that could cut off an individual's right to secure bankruptcy relief."); see also *In re Deaton*, 65 Bankr. 663, 664-65 (Bankr. S.D. Ohio 1986) (noting congressional refusal to adopt a mandatory Chapter 13).

¹³⁵ See Act of July 10, 1984, Pub. L. No. 98-353, § 305, 98 Stat. 303, 352 (amending 11 U.S.C. § 521 (1982)). Subsection (1) was amended by including therein a requirement that the debtor file a schedule of current income and expenditures. For an examination of the consequences of such a requirement, see *In re Grant*, 51 Bankr. 385, 394-95 (Bankr. N.D. Ohio 1985); *In re Wright*, 48 Bankr. 172, 174 (Bankr. E.D.N.C. 1985); see also *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985) (court relying heavily on schedules to find substantial abuse).

¹³⁶ See, e.g., *In re Kress*, 57 Bankr. 874, 876 (Bankr. D.N.D. 1985); *In re Kelly*, 57 Bankr. 536, 538 (Bankr. D. Ariz. 1986); *In re Edwards*, 50 Bankr. 933, 939 (Bankr. S.D.N.Y. 1985); *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985).

¹³⁷ For a discussion of these statistics and their use in the context of Chapter 13 cases, see *In re Jones*, 55 Bankr. 462 (Bankr. D. Minn. 1985); S. REP. NO. 65, 98th Cong., 1st Sess. 20-22 (1983). Given that, for many courts, the determination of substantial abuse hinges in part on whether a Chapter 13 plan could be confirmed, it is appropriate to examine methods of determining Chapter 13 plan payments by way of analogy. For examples of the use of this analogy, see generally Breitowitz, *Installments I and II*, *supra* note 19.

¹³⁸ See, e.g., *In re Hudson*, 64 Bankr. 73, 75 (Bankr. N.D. Ohio 1986) (noting that debtors' expenses did not conform to court's conception of what an average family of five might spend to maintain a reasonable standard of living); *In re Shands*, 63 Bankr. 121, 124 (Bankr. E.D. Mich. 1985) (finding that debtor's main purpose in filing was to frustrate her husband); *In re Hamze*, 57 Bankr. 37, 39 (Bankr. E.D.

demand that a debtor adjust her lifestyle if she is to obtain a Chapter 7 discharge.

3. Difficulties in Application of the Expansive Paradigm

None of these approaches is particularly satisfactory. The purely quantitative approach is simply a different method of creating a future income test. While easy to apply, the approach is premised on the erroneous assumption that the availability of future income is always synonymous with abuse.¹³⁹ The statistical approach suffers from being inflexible by treating each debtor on the basis of predetermined norms rather than by her individual circumstances.

The qualitative approach presents two major problems of its own. First, it replaces the debtor's judgment of the way she wants to live with that of the court.¹⁴⁰ Second, by permitting courts to make such judgments, it creates the potential for considerable inconsistency in the way in which similarly situated debtors are treated under the Code. The result of such inconsistent treatment is compounded by the fact that section 707(b), by its terms, is only applicable to a specific subcategory of debtors and within that grouping, to those debtors with a particular type of debt. For example, an individual debtor whose indebtedness consists primarily of an unsatisfied judgment for the purchase price of household furniture could potentially be subjected to different treatment than an individual in virtually identical economic circumstances whose indebtedness consists primarily of an unsatisfied judgment for a tort.¹⁴¹ The very real prospect of inconsistent results runs

Mich. 1985) (finding no substantial abuse where debtor's large expenditure was to visit his family in Lebanon after his family's village was bombed); *In re Bell*, 56 Bankr. 637, 642 (Bankr. E.D. Mich. 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986) (stating that, among other expenses, debtor's costs for meals at restaurants and for maintaining a luxury car were excessive given his financial status); *In re Grant*, 51 Bankr. 385, 394-96 (Bankr. N.D. Ohio 1985) (detailing debtors' excessive spending habits and finding their proposed household budget similarly excessive); *In re Bryant*, 47 Bankr. 21, 25-26 (Bankr. W.D.N.C. 1985) (questioning debtor's payment schedule and accusing him of trying to maintain an exorbitant lifestyle during his bankruptcy period); *see also infra* text accompanying notes 140-46.

¹³⁹ In *In re Edwards*, 50 Bankr. at 933, for example, although the court recognized that an excess of income over expenses can constitute abuse, *see supra* notes 113-14 and accompanying text, the court went beyond the data supplied on the debtors' schedules to find that the debtors were about to have a fourth child and that this would result in a loss of future income that was not predicted in the projected schedules.

¹⁴⁰ *See In re Kitson*, 65 Bankr. 615, 621 (Bankr. E.D.N.C. 1986).

¹⁴¹ *See In re White*, 49 Bankr. 869, 875 (Bankr. W.D.N.C. 1985). Another anomalous result occurs if a debtor could not have been a debtor in Chapter 13, *see* 11 U.S.C. § 109(e) (1982) (limiting who may be a debtor under Chapter 13), and therefore had to reorganize under Chapter 11. The results for the debtor would now be

contrary to one of the very goals of the Amendments, namely the creation of a relatively consistent approach to debtors wherever they may file.¹⁴² Consistency in approach is beneficial to creditors as well as debtors. It enables creditors to evaluate the risks presented by a filing should a prospective borrower subsequently become unable to repay what is owed and permits borrowers to be aware of the risks of filing for relief.

Although some courts have expressed reservations about the qualitative approach, recognizing the difficult issues inherent in such value judgments, others have shown little, if any, reluctance in examining the nature of a debtor's proposed expenditures in order to assess the degree of hardship that the debtor might avoid by obtaining a Chapter 7 discharge as opposed to reorganizing under Chapter 13.¹⁴³ As expressed by the court in *In re Bryant*:

Even assuming arguendo these figures to be appropriate, the nature and extent of the Debtor's expenses make his attempt to maintain this standard of living while in a bankruptcy proceeding rather suspect. Consider that the Debtor's family has for its personal use both a 1983 Buick and a 1984 Buick. To maintain these vehicles costs the Debtor's family some \$731.00 per month This is more than most families spend on home mortgage payments. Were the Debtor to eliminate just one of these vehicles and apply the savings to a Chapter 13 plan, as much as \$400.00 per month would be available to satisfy his debts.

In like measure, the Debtor claims expenses of \$100.00 per month for dining out and for going to the movies. He claims another \$65.00 per month for cable television. . . .

vastly different than those that would arise under 11 U.S.C. § 1325(b) (1982). See *infra* notes 225-352 and accompanying text. Therefore, "similarly" situated debtors would be subject to markedly different treatment.

¹⁴² As has already been noted, see *supra* notes 69-75 and accompanying text, the Amendments were intended to aid in resolving the inconsistencies resulting from the different interpretations courts had given the term "good faith" under § 1325(a)(3); see also *In re Campbell*, 63 Bankr. 702, 704 (Bankr. W.D. Mo. 1986) (Inconsistent interpretations led to the enactment of § 707(b), which made the bankruptcy judge the exclusive arbiter of substantive abuse.).

¹⁴³ For examples of cases expressing reservations to this type of approach, see *In re Kitson*, 65 Bankr. at 621-22; *In re Gaukler*, 63 Bankr. 224, 226 (Bankr. D.N.D. 1986); *In re Christian*, 51 Bankr. 118, 120-21 (Bankr. D.N.J. 1985), *aff'd*, 804 F.2d 46 (3d Cir. 1986); *In re Edwards*, 50 Bankr. 933, 940 n.9 (Bankr. S.D.N.Y. 1985). For cases expressing no such reservations, see, for example, *In re Grant*, 51 Bankr. 385, 395-97 (Bankr. N.D. Ohio 1985); *In re Bryant*, 47 Bankr. 21, 21 (Bankr. W.D.N.C. 1985).

[T]he court has serious questions about their appropriateness for a Debtor in Chapter 7.¹⁴⁴

A similar sentiment can be seen in *In re Grant* where the court observed:

Both Robert and Cherry Grant testified to making costly purchases of clothing—a \$700 men's suit from Saks Fifth Avenue, and \$2100 in women's clothing from an exclusive dress shop. The Grants' Christmases must be quite an extravaganza; Robert Grant testified that the \$9,000 loan of November, 1983 from Joe Huggins was primarily for Christmas items. Curious, as well, is Robert Grant's practice of sending by U.S. Mail \$400 in cash each month to his son who is attending college out-of-state.¹⁴⁵

On its face, admittedly, section 707(b) does not suggest that the expansive interpretation adopted increasingly by the courts is impermissible. Indeed, as has been suggested, the passage of the Amendments in an environment sympathetic to the credit industry's position might permit the argument that such an interpretation is mandated.¹⁴⁶ The argument fails, however, because, as it has also been noted, neither the language of the existing Code provisions nor Congress's defeat of a threshold test for Chapter 7 suggests an expansive interpretation.¹⁴⁷ The Amendments might well have been intended to reestablish an appropriate balance between the interests of debtors and creditors, given the perception that the balance had shifted in favor of debtors. There is, however, no evidence that Congress intended to alter fundamental bankruptcy policy.¹⁴⁸

¹⁴⁴ *In re Bryant*, 47 Bankr. at 25-26.

¹⁴⁵ *In re Grant*, 51 Bankr. at 396.

¹⁴⁶ See, e.g. *In re Kress*, 57 Bankr. 874, 877-78 (Bankr. D.N.D. 1985) (relying on Amendments' legislative history to find that substantial abuse is determined by the debtor's ability to repay her debts in three years).

¹⁴⁷ For a contrary view, see *In re Kelly*, 57 Bankr. 536, 539 (Bankr. D. Ariz. 1986) (quoting Rep. Anderson) ("[T]he bankruptcy court could dismiss a chapter 7 filing if in its opinion the filing constitutes a 'substantial abuse' of the Bankruptcy Code because the debtor is found capable of fulfilling the terms of a chapter 13 repayment agreement.").

¹⁴⁸ Both the House and Senate reports observed in connection with original § 707: "The section does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal. To permit dismissal on that ground would be to enact a non-uniform mandatory chapter 13, in lieu of the remedy of bankruptcy." SENATE REPORT, *supra* note 21, at 94; HOUSE REPORT, *supra* note 21, at 380; accord *In re Williams*, 15 Bankr. 655 (E.D. Mo. 1981), *aff'd*, 696 F.2d 999 (8th Cir. 1982). Even the court in *In re Grant*, 51 Bankr. 385, 392 (Bankr. N.D. Ohio 1985), which expansively interpreted § 707(b), recognized that Congress did not intend to do away with the debtor's fresh start. Accord *In re Kress*, 57 Bankr. at 538; *In re Edwards*, 50 Bankr. 933, 936 (Bankr. S.D.N.Y.

Thus, while courts in a number of recent cases have adopted the expansive approach in holding or dicta, some appear to have strained to avoid the result dictated by their own reasoning, a result that would eradicate the fresh start policy.¹⁴⁹ For example, in several cases dismissing petitions under section 707(b), courts have sought out grounds for dismissal other than the debtor's ability to pay out of future income and her election not to do so, that is, grounds that would enable the courts to sidestep the conflicts inherent in a broadbased reading of section 707(b). In the cases of *In re Hudson*,¹⁵⁰ *Grant*, and *Bryant*, for example, the debtors either failed to disclose or inaccurately disclosed financial data, and these issues, coupled with the other factors, enabled the respective courts to apply section 707(b) to dismiss the cases.¹⁵¹ In looking at section 707(b), then, one need ask how a court might interpret this provision in a manner consistent with both fundamental bankruptcy policy and Congress's legitimate legislative purposes in enacting the Consumer Credit Amendments.¹⁵²

4. The Meaning of Substantial Abuse

While the case law under section 707(b) increasingly has adopted the position that dismissal on the basis of substantial abuse is only available in the context of a case involving an individual debtor with consumer debts,¹⁵³ such a reading is not mandated by the statute. A court may dismiss a case on the grounds of substantial abuse under

1985).

¹⁴⁹ See, e.g., *In re Mastroeni*, 56 Bankr. 456, 459 (Bankr. S.D.N.Y. 1985) (because debtor was ineligible for Chapter 13 relief, and Chapter 11 was not a meaningful alternative, court found no substantial abuse); *In re Edwards*, 50 Bankr. at 939 (because court was satisfied that debtors had little prospect of being able to propose or to complete a meaningful Chapter 13 plan, it granted debtor a Chapter 7 discharge).

¹⁵⁰ 64 Bankr. 73, 75-76 (Bankr. N.D. Ohio 1986).

¹⁵¹ See *In re Hudson*, 64 Bankr. at 75-76; *In re Grant*, 51 Bankr. at 397; *In re Bryant*, 47 Bankr. 24, 26 (Bankr. W.D.N.C. 1985). There are, however, cases where a court ordered dismissal solely on the ground that the debtor was able to pay her debts in a reorganization chapter. See *In re Bell*, 56 Bankr. 637 (Bankr. E.D. Mich 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986); *In re Colton*, ABI Newsl. June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1985). For cases wherein a court has expressed reluctance towards adopting a per se rule, see *In re Shands*, 63 Bankr. 121, 124 (Bankr. E.D. Mich. 1985).

¹⁵² For general guidance on statutory construction, see 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.12 (N. Singer ed. 1984) (discussing "golden rule" of "reasonable" statutory interpretation).

¹⁵³ See, e.g., *In re Grant*, 51 Bankr. 385, 389 (Bankr. E.D. Ohio 1985); *In re Whitby*, 51 Bankr. 184, 186 n.1 (Bankr. E.D. Mich. 1985); *In re Edwards*, 50 Bankr. 933, 935 (Bankr. S.D.N.Y. 1985); *In re White*, 49 Bankr. 869, 871 (Bankr. W.D.N.C. 1985); *In re Bryant*, 47 Bankr. 21, 24 (Bankr. W.D.N.C. 1984).

section 707(a) if it finds, in its discretion, that such abuse constitutes "cause." In lieu of a definition of "cause," section 707(a) offers two examples under the nonexclusive prefatory term "including," thereby permitting substantial abuse to fall within the scope of "cause."¹⁵⁴ Congress thus has made explicit, in the context of consumer debtors, what always was implicit in the context of all debtors, namely that a court may dismiss a case if it finds that the debtor is abusing the bankruptcy process.

One plausible interpretation of section 707, then, is that it is intended—even while making explicit an existing basis for dismissal—to narrow the parties that can seek dismissal on the grounds of substantial abuse. By its terms, section 707(a) would permit creditors and a court to dismiss any case for substantial abuse. The section is silent, however, as to who could bring the issue to the court's attention.¹⁵⁵ Arguably, then, what section 707(b) does is to take away the right creditors themselves had to raise the issue of abuse. Thus, the creditor arsenal, in the context of consumer debtors, has been limited to some extent by section 707(b).

A close analysis of the actual wording of section 707(b) provides some insight into what might have been intended by this section. The term substantial abuse is followed by the words "of the provisions of this chapter."¹⁵⁶ This phrase suggests that section 707(b) is applicable only to violations of the specific provisions of Chapter 7, as distinguished from violations of the Code as a whole.¹⁵⁷ This wording sug-

¹⁵⁴ See 11 U.S.C. § 102(3) (1982).

¹⁵⁵ Section 707(a) provides that "a court may dismiss a case," but it is silent as to who may bring the issue to the court's attention. See 11 U.S.C. § 707(a) (1982 & Supp. III 1985), amended by The Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —. Section 707(b), on the other hand, provides that "the court, on its own motion, or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss" See 11 U.S.C. § 707(b) (1982 & Supp. III 1985), amended by The Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —. The court in *In re Christian*, 51 Bankr. 118, 122 (Bankr. D.N.J. 1985), *aff'd*, 804 F.2d 46 (3d Cir. 1986), examined this apparently clear section before the 1986 amendments and determined that it meant exactly what it said—the court only on its own motion and *not at the request of any party in interest* may dismiss a case. *Accord In re Campbell*, 63 Bankr. 702, 704 (Bankr. W.D. Mo. 1986); *In re Love*, 61 Bankr. 558 (Bankr. S.D. Fla. 1986); *In re Jones*, 60 Bankr. 96, 98 (Bankr. W.D. Ky. 1986); *In re Whitby*, 51 Bankr. at 186 n.1.

¹⁵⁶ 11 U.S.C. § 707(b) (Supp. III 1985), as amended by Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —.

¹⁵⁷ This is to distinguish dismissal under § 707(b) from other Code provisions relating to dismissal and denials of discharge. See, e.g., 11 U.S.C. §§ 105, 305, 523, 727 (1982).

gests that the term substantial abuse can and should be narrowly construed.¹⁵⁸

Such a narrow reading is consistent with the fact that no provision within Chapter 7 prohibits an individual from seeking relief when she could be a debtor under Chapter 13. Nor does the language of Chapter 7 suggest that a discharge should be conditioned on a debtor's lack of future income. Therefore, no matter how the term substantial abuse is interpreted, it should not be interpreted to mean the election not to repay one's creditors out of future income. Such a principle neither explicitly nor implicitly constitutes an abuse of the provisions of Chapter 7. The issue, then, of what "wrong" violates Chapter 7, but which is not covered elsewhere within that Chapter, becomes a crucial one.

B. *The Narrow Paradigm*

A nonexpansive interpretation of section 707(b) that would not eviscerate the section might suggest that 707(b) was designed to codify a court's implied right to dismiss any Chapter 7 case involving consumer debtors that subverts the purposes of filing under the Chapter. Phrased differently, this narrow interpretation suggests that section 707(b) makes explicit the longstanding ability of a court to dismiss a Chapter 7 case for *lack of good faith*.¹⁵⁹ Both Chapters 11 and 13 have express good faith provisions as prerequisites for relief thereunder.¹⁶⁰ The reading of section 707(b) to include a good faith standard is not equivalent to stating, as do proponents of the expansive paradigm,¹⁶¹ that the availability of future income is a basis for dismissal. This lack of equivalency is supported by the case law of Chapter 13. Prior to the passage of the Amendments, creditors expressed concern that the inclusion of a good faith standard in Chapter 13 had not been read consistently by the courts to mean that a debtor must give all of her future income to her creditors.¹⁶² It is because good faith did not imply a requirement that all available income be applied to pay creditors that creditors fought for the adoption of the more explicit provision of sec-

¹⁵⁸ See *In re Christian*, 63 Bankr. 71, 73-74 (Bankr. D.N.J. 1986), *aff'd*, 804 F.2d 46 (3d Cir. 1986).

¹⁵⁹ The bankruptcy courts historically have had ample discretion to dismiss a Chapter 7 petition where the petition has been "filed in bad faith." See *In re Ericson*, 26 Bankr. 973, 976 (Bankr. C.D. Cal. 1983). But see Ginsberg, *Update, supra* note 37, at 239 (indicating that "substantial abuse," in a precursor to § 707(b), must have meant "something different than bad faith").

¹⁶⁰ See 11 U.S.C. § 1129(a)(3) (1982); 11 U.S.C. § 1325(a)(3) (1982).

¹⁶¹ See *supra* notes 110-34 and accompanying text.

¹⁶² For a discussion of the credit industry's view, see *supra* notes 69-73 and accompanying text.

tion 1325(b).¹⁶³ Accordingly, creditors cannot reasonably suggest that the insertion of a good faith standard in Chapter 7 achieves something they knew it never accomplished in the context of a Chapter 13 case.

Section 707(b), as interpreted under a narrow paradigm, would permit a court to dismiss a Chapter 7 case where an individual debtor's conduct in incurring the debts that she seeks to have discharged was of a nature sufficient, in the words of one court interpreting this section, "to shock the conscience of the Court."¹⁶⁴ The question of whether a case should be dismissed under section 707(b) ought to be decided on a case-by-case analysis, rather than on the basis of a rigid predetermined test keyed to future income alone. Under a narrow paradigm, section 707(b) is intended to cover those very few cases in which the debtor's conduct does not fit squarely within any of the explicit standards for dismissal or nondischargeability set out in Chapter 7,¹⁶⁵ but in which the debtor's conduct is of such a nature that recourse to the provisions of Chapter 7 generally, particularly in view of the attendant injury to creditors, would contravene the most fundamental notions of fairness and the purposes of Chapter 7. The phrase "of the provisions of Chapter 7" in section 707(b) should be read, then, to apply to either implicit or explicit violations of the provisions and philosophy underlying Chapter 7 cases.

A narrow interpretation of section 707(b) would require courts to make a very different analysis from that which they have made and may continue to make under an expansive interpretation. Rather than focusing on the single, rigid standard of whether a debtor can repay creditors out of future income, courts will focus on the nature of Chapter 7 and the debtor's obligations, with a view towards determining whether this debtor is what one could term an "honest" as distinguished from "dishonest" debtor. Such an inquiry is consistent with a prevailing theme in bankruptcy jurisprudence: the bankruptcy laws should protect honest debtors who have unfortunately incurred obligations that they cannot repay, but not debtors who have systematically defrauded their creditors.¹⁶⁶

The credit industry might argue that the act of incurring debt that one cannot repay is itself the essence of debtor dishonesty, but such a view finds no support in past or present bankruptcy philosophy. In fact, one might argue that the credit industry is equally blameworthy.

¹⁶³ See *id.*; see also *supra* notes 73-80 and accompanying text.

¹⁶⁴ *In re Christian*, 51 Bankr. 118, 121 n.3 (Bankr. D.N.J. 1985), *aff'd*, 804 F.2d 46 (3d Cir. 1986).

¹⁶⁵ See, e.g., 11 U.S.C. §§ 523, 727 (1982).

¹⁶⁶ See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

One of the very reasons individual debtors are in the position of owing more than they can repay to their creditors is the fact that the creditors themselves have extended too much credit.¹⁶⁷ The ease with which the credit industry has extended unsecured credit to individuals who, given their income level and the state of the economy, may well be unable to repay, is at the root of many a debtor's problems.¹⁶⁸ The very person who puts a debtor into financial difficulty will be hard pressed to suggest that such a debtor is dishonest for being in that predicament. If there is any "dishonesty" in these situations, it is that of the creditors, aggressively seeking to maximize profits knowing that the subject of their practices will be unable, either over the long or short term, to repay what is owed.

1. A Comparison of Results Under the Paradigms

The problems caused by an expansive interpretation of the Amendments and the benefits of a narrow interpretation are clearly illustrated in a series of hypotheticals. Consider a physician who is just completing her residency at a major teaching hospital and who is contemplating entry into a lucrative private practice. Assume that in all of the following hypotheticals the doctor would be able to repay her creditors in full in a Chapter 13 case but that she does not, at present, have sufficient non-exempt assets to do so.¹⁶⁹ As such, her creditors would get only a meager distribution in a Chapter 7 case.

Hypothetical One: The doctor has several unsecured trade creditors to whom she is paying minimum monthly installments as required. The doctor also owes money to a secured creditor who has sold an automobile to the debtor. The doctor is behind in these payments, and the creditor is threatening foreclosure. Assume that the automobile is the debtor's second car. The doctor seeks relief under Chapter 7 merely to postpone the foreclosure on the second car. Assume that the debtor has determined that she wants the second car sold but that she wants to sell

¹⁶⁷ See Ayers, *supra* note 29, at 738 ("[W]hile the credit industry blames its losses upon the ready availability of bankruptcy, it seems clear that they are also responsible for a certain portion of the bad debt losses.").

¹⁶⁸ See *id.*; Countryman, *supra* note 9, at 825 ("[I]mprovident credit extenders not only get unsophisticated debtors into trouble by overloading them with debt, but also jeopardize the loans made earlier to the same debtors by prudent credit extenders."). For an overview of the interrelationship between economic considerations in the context of amendments to the Code, see *Reform Symposium*, *supra* note 101, at 1.

¹⁶⁹ Cf. *In re Campbell*, 63 Bankr. 702, 703 (Bankr. W.D. Mo. 1986) ("[D]octors may be slow pay but always eventually pay because they all become rich . . ."); *In re Kress*, 57 Bankr. 874, 876 (Bankr. D.N.D. 1985) (court "cannot and does not ignore" a doctor's earning capacity).

it at a time and in a manner of her choosing. By filing, the doctor believes that she will gain, in addition to time, leverage in terms of persuading the secured creditor to wait to foreclose.

Hypothetical Two: The doctor incurs substantial, unsecured indebtedness from a variety of lenders for personal use. Assume that there is no fraud on the debtor's part in obtaining these loans and, hence, they would be dischargeable under applicable Code provisions. Assume also that the doctor spent the loan proceeds on speculative ventures in the stock market and that all of the monies were lost due to poor investments. In addition to these debts, the doctor owes other creditors for goods and services provided. She has paid the latter group of creditors in the ordinary course on an installment basis. The doctor seeks relief under Chapter 7 principally to obtain relief from the losses in the stock market.¹⁷⁰

Hypothetical Three: The doctor has incurred unsecured debt in the ordinary course. Some of this indebtedness is for "non-luxury" items such as food, clothing, furniture, books, and other day-to-day expenses, including cash advances. The doctor has also purchased several "luxury" items, including a fur coat, a stereo, a hot-tub, and a vacation in the Caribbean. She seeks relief from all of this indebtedness, because she cannot satisfy the minimum monthly debt service.

Hypothetical Four: The doctor has incurred unsecured credit in the ordinary course and is unable, at her present earning level, to meet the requisite debt service payments. The doctor did not purchase any "luxury" items but rather purchased clothing, furniture, books, food, and other day-to-day expenses. She seeks relief under Chapter 7 to get out from under excessive debts.

Prior to the adoption of the Amendments, no provision of the Code expressly mandated dismissal or denial of a discharge in any of these hypotheticals. Creditors have sought dismissal in cases analogous to that in Hypothetical One by arguing that the debtor's delay was tanta-

¹⁷⁰ For purposes of this analysis, there is an assumption that the debts incurred by the doctor are "consumer debts," as § 707(b) is applicable only in such contexts. The debtor borrowed the sums for "personal" use, even though the monies were ultimately expended for nonhome use. A recent decision, *In re Almendinger*, 56 Bankr. 97, 99 (Bankr. N.D. Ohio 1985), held that sums expended with a profit motive are not consumer debts. In that case, the debtor used cash advances on his credit cards to repay investment losses in the stock market and to reinvest in the market. By taking the particular debt in question outside the scope of § 707(b), the court was able to avoid dismissal under that section. The court could have reached the same result (nondismissal) under a narrow interpretation, as is suggested by the solution to the variation of Hypothetical Two. See *infra* text accompanying notes 185-90.

mount to "cause" under former section 707.¹⁷¹ Creditors also have sought dismissal in cases analogous to Hypothetical One under section 305,¹⁷² although it would be difficult to demonstrate that such a result is in the debtor's best interest, which is a crucial inquiry of that provision.¹⁷³ Finally, in cases analogous to Hypothetical One, creditors have urged courts to read into Chapter 7 an obligation of good faith that would allow the court to dismiss the case on the ground that delay caused by the filing constitutes bad faith.¹⁷⁴

Similar arguments would have to be made in the context of the next two hypotheticals. While a creditor might seek to have a court dismiss these cases under former section 707, or section 305, or on the basis of an implied good faith requirement, the likelihood of creditor success is at best uncertain. Hypothetical Four would have presented an even greater problem, because, unlike the other hypotheticals, the only possible "cause" under section 707 would be the doctor's incurring indebtedness that she cannot repay and her election to liquidate rather than reorganize. A situation similar to that in Hypothetical Four was presented in *In re Graham*, where a doctor filed for relief under Chapter 7 and the debtor's former spouse tried to convert the case into a Chapter 11 case.¹⁷⁵ In denying the request, the court observed that:

An order converting Dr. Graham's bankruptcy proceedings from Chapter 7 to Chapter 11 would have the effect, assuming a reorganization plan were subsequently confirmed and complied with, of diverting some of the fruits of Dr. Graham's future labors from himself to his pre-petition creditors. In essence, a[] . . . conversion might amount to an order to Dr. Graham to work for his pre-petition creditors and

¹⁷¹ See *In re Lang*, 5 Bankr. 371, 374 (Bankr. S.D.N.Y. 1980). It is important to note that this case, although involving delay, is distinct from that in Hypothetical One, because in that hypothetical the debtor did not delay in filing; rather, the filing itself was for the purpose of delay or of gaining time. See *id.*

¹⁷² 11 U.S.C. § 305(a)(1) (1982) states, in relevant part: "The court, after notice and a hearing, may dismiss a case under this title, . . . at any time if—[1] the interests of . . . the debtor would be better served by such dismissal or suspension"

¹⁷³ See *In re Whitby*, 51 Bankr. 184, 185 (Bankr. E.D. Mich. 1985); *In re Lufttek, Inc.*, 6 Bankr. 539, 547-48 (Bankr. E.D.N.Y. 1980).

¹⁷⁴ See *In re Lang*, 5 Bankr. at 374-75 (rejecting creditor's argument that debtor's delay in filing petition amounted to a fraud, and implicitly, a lack of good faith on the part of the debtor).

¹⁷⁵ See *In re Graham*, 21 Bankr. 235, 236 (Bankr. N.D. Iowa 1982). In *Graham*, the debtor's former spouse contemplated that creditors could receive more in a Chapter 11 case, an observation that may be inaccurate in light of the fact that the debtor's future income is not property of the Chapter 11 estate under § 541(a)(6). See 11 U.S.C. § 541(a)(6) (1982); see also *In re Fitzsimmons*, 725 F.2d. 1208, 1210-11 (9th Cir. 1984).

would thus be like a mandatory Chapter 13 proceeding

. . . In the view of Congress, it is more important to encourage a debtor to retain his or her employment, instead of running the risk of a debtor's walking away from his or her job in order to avoid working to fund a repayment plan that primarily benefits someone else [I]t is better, for Dr. Graham, and presumably, for society, that Dr. Graham continue to service three hospitals instead of cutting back on his services because of an unwillingness to fund a Chapter 11 reorganization plan.¹⁷⁶

The problem of obtaining either a dismissal or nondischargeability of certain debt in situations akin to all of these hypotheticals, and particularly Hypothetical Four, raised the ire of the consumer credit industry prior to the passage of the Consumer Credit Amendments.¹⁷⁷ From the creditor perspective, the facts in all four hypotheticals presented instances of abuse requiring the dismissal of Chapter 7 cases. It is not clear whether Congress shared this view or whether Congress was more troubled by the situations raised by Hypotheticals One through Three.

Following the passage of the Amendments, under the expansive interpretation of section 707(b) noted above,¹⁷⁸ courts would be likely to dismiss the Chapter 7 cases presented in each of the hypotheticals because the debtor in each could repay her creditors out of future earnings. The availability of future income would be the key factor in determining whether there was substantial abuse. Such an expansive interpretation would permit dismissal even in the situation presented in Hypothetical Four, where the debtor's only "wrong" was being in debt above her present means while having the earning power to allow for eventual repayment of such debt.

Under a narrow interpretation of section 707(b), a court still would be likely to dismiss the cases presented in Hypotheticals One and Two, although these results would be reached for very different reasons than those suggested by an expansive interpretation.¹⁷⁹ The situations in Hypotheticals Three and Four, however, would not warrant

¹⁷⁶ *Graham*, 21 Bankr. at 238-39.

¹⁷⁷ For a summary of the credit industry's view as to who should be eligible for bankruptcy relief, see *Hearing on S. 333 and S. 445 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 258 (1983) (statement of Jonathan M. Landers on behalf of the National Coalition for Bankruptcy Reform).

¹⁷⁸ See *supra* notes 110-38 and accompanying text.

¹⁷⁹ See *infra* text accompanying notes 183-90.

dismissal, although the "luxury" debts in Hypothetical Three would be nondischargeable.¹⁸⁰ This result achieves a better balance between the needs of both debtors and creditors. Although, under an expansive interpretation, the result in Hypothetical Three would be dismissal as distinguished from nondischargeability, creditors should not be unhappy with and may even prefer the result achieved through a narrow interpretation, namely, nondischargeability.¹⁸¹ The result of non-dismissal of Hypothetical Four, although likely to meet with dissatisfaction among creditors, is fully consistent with the bankruptcy philosophy that allows any debtor to seek relief when she cannot repay her debts.¹⁸²

The dismissal of Hypotheticals One and Two under a narrow paradigm stems from application of the term substantial abuse. Dismissal would not be based on the fact that the debtor will be a high earner following her residency and thus able to repay creditors in full. Rather,

¹⁸⁰ The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 307(a)(2)(C), 98 Stat. 333, 353-54 (codified at 11 U.S.C. § 523(a)(2)(C) (1982 & Supp. III 1985)) provides, in pertinent part:

(c) consumer debts owed to a single creditor and aggregating more than \$500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than \$1000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor

¹⁸¹ Nondischargeability under Chapter 7 is governed by 11 U.S.C. § 727(a) (1982 & Supp. III 1985). One distinction between dismissal and nondischargeability is that when a case is dismissed the debtor can refile and seek discharge of the same indebtedness. See 11 U.S.C. § 349(a) (1982). Refiling is not helpful to the debtor, however, if the debts are nondischargeable. Thus, because of the possibility of refilings after dismissals, creditors may be better off if the debts are nondischargeable, except with respect to "luxury goods," where the nondischargeability is geared to the point in time at which the debts are incurred in relation to the filing. See 11 U.S.C. § 523(a)(2)(C) (Supp. III 1985). If, however, a specific debt is nondischargeable as a luxury item and discharge of this item is precluded, what is to prevent the debtor from refiling six months later to discharge this sum? Even if the debtor is unlikely to prevail, the debtor's refiling causes creditors the same delay, due to the automatic stay that follows a filing, see 11 U.S.C. § 362(a) (1982 & Supp. III 1985), in enforcing their claims as did the refilings after dismissal. The creditors, however, might seek to have the stay lifted. See 11 U.S.C. § 362(d) (1982 & Supp. III 1985).

As presently drafted, the repeat filer exclusion of § 109 does not include within its parameters repeat filings following dismissals under § 707(b). That exclusion of § 109 relates only to debtors who do not obey court orders. See 11 U.S.C. § 109(f)(1) (1982 & Supp. III 1985). Although the drafting of § 109 to include dismissal might have made dismissal a more serious sanction for the debtor, as the Code is presently drafted, there is as a practical matter little to distinguish dismissal from nondischargeability of a specific debt.

¹⁸² See *supra* notes 1-2 and accompanying text.

the focus is on the debtor's motivation for seeking relief under the Code and the nature of the indebtedness that she is seeking to have discharged. In Hypothetical One, the debtor's filing serves only to delay foreclosure. While delay has seldom been viewed as a basis for denial of relief under Chapter 7, it has been used frequently in the dismissal of Chapter 11 cases in which debtors seek not to reorganize but rather to stall lender foreclosure.¹⁸³ By analogy, where a debtor seeks relief under Chapter 7 solely for purposes of delaying a creditor, and where, at least in this instance, such action does not even eliminate the ultimate result sought by the creditor, the essential purpose of a Chapter 7 case—the liquidation of debts in an organized fashion so that one can begin anew—is eroded.¹⁸⁴

In Hypothetical Two, a narrow approach again suggests dismissal, this time because of the nature of the indebtedness.¹⁸⁵ Prior to the passage of the Amendments there was no express provision in either Chapter 5 or Chapter 7 differentiating between the types and character of debt for purposes of dismissal as distinguished from nondischargeability. Sections 727 and 523 have, however, always highlighted certain categories of debt that are nondischargeable. Such selections no doubt reflect value judgments about the nature of the particular debt involved and the circumstances surrounding the incurring and repayment of that debt.¹⁸⁶ Section 707(b) now also highlights a particular type of debt, namely consumer debt, as "troublesome."¹⁸⁷ The Amendments add to the list of debt not subject to discharge through the adop-

¹⁸³ See, e.g., *In re Odom Enter.*, 22 Bankr. 785, 785 (Bankr. E.D. Ark. 1982); *In re Missouri*, 22 Bankr. 600, 602-03 (Bankr. E.D. Ark. 1982).

¹⁸⁴ Here, the debtor seeks to control one of several creditors because this creditor's action is inconvenient. Such a case, in which delay is a debtor's sole objective, is readily distinguishable from the delay that occurs as a natural consequence of a filing.

A recent example in which a court looked to motivation in filing is *In re Shands*, 63 Bankr. 121, 123-24 (Bankr. E.D. Mich. 1986), where the court determined that the debtor was seeking relief for spite, namely to get back at her husband. Similarly, albeit in a different context, a court refused to grant a debtor relief under Chapter 7 where the purpose of filing was relief from obligations under an executory contract. See *In re Carrere*, [1985-86 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 71,279 (Bankr. C.D. Cal. July 6, 1986).

¹⁸⁵ For one bankruptcy court's disinclination toward gambling, albeit in a different context, see *In re Dolin*, 759 F.2d 251 (6th Cir. 1986).

¹⁸⁶ For a discussion of one such value judgment, see Kalevitch, *Educational Loans in Bankruptcy*, 2 N. ILL. U.L. REV. 325, 336-37 (1982). Professor Kalevitch argues that Congress limited the dischargeability of educational loans in order to prevent graduating college students from securing a financial "headstart" by discharging their educational loans. See *id.* For examples of other nondischargeable debts, see 11 U.S.C. § 727 (1982) (listing ten items that will prohibit a debtor from receiving a discharge); 11 U.S.C. § 523 (1982) (listing nine classes of debt that are nondischargeable).

¹⁸⁷ See *Senate Hearings*, supra note 5, at 193-95 (assessment of the "troublesome" growth in consumer debt from Visa, U.S.A., Inc.)

tion of section 523(a)(2)(C).¹⁸⁸ This subsection prohibits the discharge of recently incurred debt for luxury items.¹⁸⁹ While nothing in the Code, as amended, expressly prohibits discharging indebtedness incurred through speculation, the fact that the debtor incurred obligations with the intent to gain all of the upside if successful and none of the downside upon failure might be enough to convince a court of abuse.¹⁹⁰ Thus, while not-enumerated in sections 523 or 727, gambling debt is of such a character that the debtor should continue to be obligated to repay that debt.

Certainly in Hypothetical Two, a court must make a value judgment about the nature of the debtor's indebtedness. Such a determination, however, can be distinguished from the value judgments made in the context of an expansive interpretation of section 707(b). In Hypothetical Two, the key issue is not whether the debtor's expenses exceeded those which a person of her means should have incurred nor is it whether she had the ability to repay her lenders, due to her future earning power. The key is that the debtor "abused" Chapter 7 because, although her use of the money did not amount to fraud, she was unfair to creditors who did not expect that the true personal use for which she would borrow their money included virtually anything, even "gambling" in the stock market. In fact, had she disclosed what she intended to do with the money, the lenders would not have advanced the funds in the first instance. Hypothetical Two thus presents a situation where one would argue that the debt is nondischargeable. Although none of the existing provisions are broad enough to permit such a result, there has been an abuse of the spirit of section 727. Thus, a provision of Chapter 7 has been substantially abused within the meaning of section 707(b) and dismissal should obtain through that section.

Hypothetical Two could be varied to suggest a different result. If the debtor had not borrowed money and dissipated it through bad investment, but had instead gone to Las Vegas and obtained markers at a

¹⁸⁸ See *supra* note 180.

¹⁸⁹ See, e.g., *In re Hussey*, 59 Bankr. 573, 575 (Bankr. M.D. Ala. 1986) (construing § 523(a)(2)(C)); *In re Smith*, 54 Bankr. 299, 301-03 (Bankr. S.D. Iowa 1985) (construing § 523(a)(2)(C) but finding it inapplicable to the facts of the case).

¹⁹⁰ The court in *In re Mastroeni*, 56 Bankr. 456, 457 (Bankr. S.D.N.Y. 1985), observed that the debtor had "substantial speculative" trades in the stock market, but the court refused to find abuse under § 707(b), in part because the debtor's excessive debts made him ineligible for relief under Chapter 13. This argument creates an anomaly under the expansive paradigm. If one incurs debts over the statutory limits of Chapter 13, then, because one was not an eligible debtor under Chapter 13, one's case cannot be dismissed under Chapter 7 for failing to repay creditors under Chapter 13. Thus, debtors are encouraged to increase their obligations so as to avoid the application of § 1325(b). Consequently, the Amendments might serve to increase, rather than decrease, the incentive to incur debt that cannot be repaid.

casino through the use of a credit card, one is likely to be less sympathetic toward the creditors.¹⁹¹ After allowing debtors to use credit cards to obtain cash advances at a recognized gambling place, how can creditors revisit that decision in the guise of finding debtor abuse? The risk of loss from gambling in this variation of the hypothetical should perhaps be on the creditor rather than the debtor.¹⁹² Therefore, in proceeding under section 707(b), it is not enough for the courts to look at the nature of the indebtedness to determine abuse; they should also evaluate the way in which the debt was incurred.

Under a narrow paradigm, because of the existence of section 523(a)(2)(C), which was added by the Amendments,¹⁹³ Hypothetical Three does not mandate dismissal under section 707(b). Section 523(a)(2)(C) provides that debts incurred from the purchase of luxury goods and services and incurred in contemplation of filing are nondischargeable. This section redresses a serious wrong experienced by creditors prior to the adoption of the Amendments: debtors went "spree buying" knowing full well that such obligations would be discharged.¹⁹⁴ Thus, if the debtor incurred such debts in contemplation of filing, a rebuttable presumption under the Amendments,¹⁹⁵ these debts are nondischargeable, and the debtor should pay for them out of future earnings.

Hypothetical Four best demonstrates the marked distinction between the expansive and narrow paradigms. The expansive approach suggests that the mere incurring of debt beyond one's means and the failure to repay such debts is cause for dismissal.¹⁹⁶ Such an approach is, as has been noted, inconsistent with bankruptcy philosophy that every debtor should be permitted to seek relief under the federal bankruptcy laws when she cannot repay her debts.¹⁹⁷ With the abolition of debtor's prisons, our legal system did away with the stigma of punish-

¹⁹¹ See *In re Almendinger*, 56 Bankr. 97 (Bankr. N.D. Ohio 1985) (debtor obtained \$119,486.00 from credit card cash advances and lost most of it through bad investments).

¹⁹² For an overview of the interrelationship of law and economics and the allocation of the risk of loss, see A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979). For a similar discussion in the bankruptcy context, see T. JACKSON, *supra* note 1, at 228-30; Eisenberg I, *supra* note 8, at 981-83.

¹⁹³ See *supra* note 180.

¹⁹⁴ See *Senate Hearings*, *supra* note 5, at 83 ("The amendment to § 523(d) is intended to address the second unconscionable or fraudulent practice: that of 'loading up.' In many instances, a debtor will go on a credit buying spree in contemplation of bankruptcy.").

¹⁹⁵ See *supra* note 189.

¹⁹⁶ See *supra* notes 110-38 and accompanying text.

¹⁹⁷ See *supra* notes 45-49 and accompanying text.

ment just for being a debtor.¹⁹⁸ The fact that the Code's vocabulary replaced the word "bankrupt" with the word "debtor" is further evidence of the effort to decrease the stigma of bankruptcy.¹⁹⁹ Further, the opening of access to many provisions of the Code encouraged debtors to file.²⁰⁰ The expansive approach to section 707(b) undercuts all of these policy choices in the name of curing abuse. A narrow interpretation, on the other hand, permits a court to dismiss a Chapter 7 case where no other provision of the Code, other than perhaps the court's powers under section 105,²⁰¹ would accord relief.²⁰² The debtor in Hypothetical Four is not a "dishonest" debtor in the sense that she committed a fraud on her creditors or enticed lenders to lend. Rather, she is an honest debtor in financial trouble, albeit trouble not caused by a catastrophic or tragic event.²⁰³ Moreover, as noted above,²⁰⁴ she got into that trouble because of the actions of the very creditors that now are trying to prevent her from obtaining relief. The bankruptcy laws cannot protect creditors by serving both as their collection agent and as the monitor of who is entitled to credit and who is a good credit risk.

One might argue, however, that Hypothetical Four presents certain difficulties under a narrow paradigm, especially since most Chapter 7 cases occur in the context of a debtor with no non-exempt assets. If the debtor cannot repay her creditors anything in a Chapter 7 case because all of her existing assets are exempt, and if she then proceeds to live "very well" following the filing because of her increased postfiling income, one is left with a sense of unfairness to her creditors. Unlike the posited hypotheticals where the creditors are receiving something in a liquidation case, albeit a small amount, one can question whether dismissal of a Chapter 7 case is an appropriate result under section 707(b) where a creditor receives nothing and the debtor is allegedly "laughing all the way to the bank."

In some of the cases decided under section 707(b), there were few, if any, non-exempt assets available for distribution to unsecured creditors.²⁰⁵ In several of these cases, the debtor's situation involved some-

¹⁹⁸ See *supra* note 46.

¹⁹⁹ See HOUSE REPORT, *supra* note 21, at 310.

²⁰⁰ See *id.* at 311-12.

²⁰¹ 11 U.S.C. § 105(a) (1982) states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

²⁰² See *supra* notes 159-68 and accompanying text.

²⁰³ For decisions suggesting that a calamitous event is required, see, for example, *In re Kress*, 57 Bankr. 874, 878 (Bankr. D.N.D. 1985); *In re Kelly*, 57 Bankr. 536, 540 (Bankr. D. Ariz. 1986).

²⁰⁴ See *supra* notes 167-68 and accompanying text.

²⁰⁵ See, e.g., *In re Bell*, 56 Bankr. 637 (Bankr. E.D. Mich. 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986); *In re Grant*, 51

thing more than nonpayment of creditors coupled with an ability to repay outstanding obligations in the future.²⁰⁶ In one case, the debtor failed to disclose all of her liabilities.²⁰⁷ In another, the debtor overstated her current expenses.²⁰⁸ Several cases have confronted this issue.²⁰⁹ Unfortunately, these courts did not specifically address the distinction between asset and no-asset Chapter 7 cases, although one is left with the distinct impression that a distribution in a Chapter 7 case is not a determinative factor as long as creditors are still receiving less than they would receive in a Chapter 11 or 13 case.²¹⁰

The analysis of the court in *In re Mastroeni*²¹¹ is helpful, however, in forging an argument. In that case, the bankruptcy court issued notice to the debtor to show cause why his petition for Chapter 7 relief should not be dismissed. Although the court did not specify what initiated its suggestion of dismissal, the opinion indicates that the court found the debtor's stock market speculation to constitute abuse.²¹² It is also noteworthy that, due to the amount of the debtor's obligations, he was ineligible for relief under Chapter 13.²¹³ In evaluating the merits of dismissal, the bankruptcy court acknowledged the debtor's "abusive" behavior²¹⁴ but stated that his postpetition earnings were not available to creditors in Chapters 7 and 11,²¹⁵ and, therefore, absent this money, there was little hope of rehabilitation.²¹⁶ The court denied dismissal, observing:

Bankr. 385 (Bankr. N.D. Ohio 1985); *In re Bryant*, 47 Bankr. 21, 24 (Bankr. W.D.N.C. 1984).

²⁰⁶ See *supra* note 107.

²⁰⁷ See *In re Bryant*, 47 Bankr. at 23.

²⁰⁸ See *In re Grant*, 51 Bankr. at 395.

²⁰⁹ *In re Bell*, 56 Bankr. 637 (Bankr. E.D. Mich. 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986); *In re Colton*, ABI Newsl., June, 1986, at 10 (Bankr. W.D.N.Y. Mar. 6, 1985), *aff'd*, ABI Newsl., June, 1986, at 10 (W.D.N.Y. Nov. 21, 1986).

²¹⁰ See *Bell*, 56 Bankr. at 641. The *Bell* court's emphasis was on whether the debtor could repay a "meaningful" part of his debts from his future income. This focus suggests that the court was primarily concerned with maximizing the creditors' recoveries. Unless the asset distribution from the debtor's proposed discharge was comparable to what would have been available to creditors through a Chapter 11 or 13 reorganization, it seems that the *Bell* court would not have considered the extent of the debtor's non-exempt assets.

²¹¹ 56 Bankr. 456 (Bankr. S.D.N.Y. 1985).

²¹² See *id.* at 457.

²¹³ See *id.* at 458.

²¹⁴ See *id.* at 458-59 (spending a \$10,000 income tax refund on personal expenses shortly before filing a bankruptcy petition).

²¹⁵ See *id.* at 458.

²¹⁶ See *id.* The court in *Bell*, 56 Bankr. at 641-42, recognized the argument raised in *Mastroeni* and hence extended its analysis to Chapter 11 if the debtor was ineligible for relief under Chapter 13. This goes even farther than the expansive interpretation suggested herein.

The fact that Chapter 13 relief is available to debtors whose Chapter 7 petitions are questioned by bankruptcy courts does not mean that such debtors must forego their Chapter 7 route The new legislation contains ample factors that lean in the direction of Chapter 7 relief. Firstly, there is an express presumption . . . in favor of granting the Chapter 7 relief requested by the debtor.

. . . .

. . . Manifestly, the drafters of 11 U.S.C. § 707(b) failed to take into account the fact that if repayment is the desired goal under this section there should be no limitations placed on the eligibility of debtors for relief under Chapter 13. This oversight, in addition to the omission of specific standards to be applied in determining what constitutes a substantial abuse of the provisions of Chapter 7, highlights the inherent weakness in the efficacy of the statute.²¹⁷

Because section 707(b), with all of its ambiguities, created a presumption of relief under Chapter 7, the no-asset case should not be dismissed solely on the ground that the debtor can repay in the future. There is no reason to conclude that no-asset cases should be distinguished from asset cases for purposes of section 707(b). A small distribution or even a large distribution neither answers the question of how much a creditor would receive in a Chapter 13 case nor reveals some difference in the moral quality of the debtor. The fact that a debtor has some non-exempt assets may indicate only that she was not as "poor" as the debtor with no non-exempt assets. This proves only that debtors are not in the same financial posture when they seek relief. To suggest that a debtor who has no non-exempt assets is somehow "more dishonest" than the richer debtor who happened to have accumulated more wealth before filing turns the law on its head. Such reasoning would protect the richer debtor because her case would be less strictly scrutinized than that of the poorer debtor.

If, however, there is evidence that, due to the nature of the indebtedness, the manner in which it was incurred, or the amount of disclosure in the required schedules by the debtor in no-asset cases, there has been substantial abuse of Chapter 7, then the presumption in favor of debtor relief should be rebutted. This argument applies equally, as is

²¹⁷ *Mastroeni*, 56 Bankr. at 459-60. A similar sentiment is expressed, in the context of conversion of a Chapter 13 case to a Chapter 7 case, by the court in *In re Lepper*, 58 Bankr. 896, 901 (Bankr. D. Md. 1986).

suggested above,²¹⁸ in the context of asset cases.²¹⁹ In either case, a situation meriting dismissal would be the exception rather than the rule. Even in the case of inaccurate listings of liabilities and overstatement of expenses, one should question whether dismissal is an appropriate remedy, for the particular debts in question, or perhaps all of the debts, could be deemed nondischargeable.²²⁰ In short, even if the discharge route is not explored, dismissal in no-asset cases should follow the same pattern as that established for asset cases.

2. Consequences of the Narrow Paradigm

The narrow interpretation of "substantial abuse" as it relates to section 707(b) should apply to section 707(a) as well. As observed, a court has always been and should continue to be able to dismiss a case if there is abuse of the Code.²²¹ This basis for dismissal should apply irrespective of whether the debtor incurred consumer or any other debts. Thus, dismissal for substantial abuse is a tool to be employed by a court with respect to all debtors and by creditors with respect to debtors with nonconsumer debts where other provisions of the Code do not expressly require dismissal.²²²

If one does not adopt a narrow interpretation of section 707(b), in addition to the considerable difficulties inherent in making value judgments, an entire category of debtors will be precluded from filing cases under Chapter 7, namely, those individuals who simply incurred indebtedness and chose to liquidate their assets rather than to repay debts out of future income. All of these debtors will, if they want relief under the federal bankruptcy laws, have to look to the provisions of Chapter 13.²²³ Many debtors will be precluded even though some of them should not be deemed "abusers."

²¹⁸ See *supra* notes 205-17 and accompanying text.

²¹⁹ Even if one were to adopt the expansive test under § 707(b), a narrow interpretation of what is required for purposes of confirming a Chapter 13 plan would indicate that a debtor's future expenses are reduced in only limited circumstances. See *infra* text accompanying notes 312-31. Therefore, under a narrow paradigm of § 1325(b), creditors would not be obtaining significant payments in Chapter 13, and, hence, dismissal under § 707(b) is inappropriate. It is likely, however, that those who interpret § 707(b) expansively will apply a similar approach to § 1325(b).

²²⁰ See 11 U.S.C. §§ 523 (exceptions to discharge), 727 (discharge) (1982).

²²¹ See *supra* notes 153-55 and accompanying text.

²²² One can ask whether this problem raises an equal protection problem, although such claims in similar contexts have not been viewed with great favor. See *In re Keniston*, 60 Bankr. 742, 745 (Bankr. D.N.H. 1986); Breitowitz, *Installment II*, *supra* note 19, at 61-66.

²²³ It is recognized, however, that Chapter 11 may still be available for an individual debtor's reorganization. See *In re Moog*, 774 F.2d 1073, 1074-75 (11th Cir. 1985) (per curiam); *In re Bell*, 56 Bankr. 637, 642 (Bankr. E.D. Mich. 1986), *vacated on other grounds*, No. 85-02150-R (Bankr. E.D. Mich. Sept. 26, 1986). Chapter 11,

In sum, consumer debtors whom courts have deemed to have abused substantially the provisions of Chapter 7 have two choices: they can allow their creditors to seize their assets and garnish their wages or they can file Chapter 13 petitions. In Chapter 13, as will be discussed more fully,²²⁴ these individuals will either have to agree to repay their creditors amounts determined by reference to future earnings or suffer dismissal of their Chapter 13 cases, thereby freeing their creditors to attack their assets. An evaluation of sections 1325 and 1329 brings the difficulties of this choice, and the risks inherent in it, into better focus.

III. SECTION 1325(b)

Section 1325 sets forth the standards for confirming a Chapter 13 plan.²²⁵ Subsections (a) and (c) were unchanged by the Consumer

however, may not be appropriate for debtors in slightly different situations. In *In re White*, 49 Bankr. 869 (Bankr. W.D.N.C. 1985), for example, the debtor had only one creditor. Thus, unless that creditor approved the debtor's Chapter 11 plan, the debtor's plan would not be confirmed by the court. Moreover, due to the amount of indebtedness owed by the debtor to this single creditor, Chapter 13 was unavailable. Consequently, if the court denied the debtor access to Chapter 7 pursuant to § 707(b), the debtor would be precluded from all options under the Code. As expressed by the court:

Conversely, if this case is dismissed [under § 707(b)], the Petitioner must elect between two unsavory options. First, he can remain outside the protection of the bankruptcy system, leaving himself liable for this Judgment. He would then labor, without incentive and without the opportunity to improve his position that is so fundamental to what is referred to as the "American way of life." . . . He would have little incentive to work and might well become no more than a ward of the State.

Second and alternatively, this Petitioner could refile a Petition under Title 11. . . . [T]he Petitioner would have to satisfy [the sole creditor's] demands and conditions in order to get relief in bankruptcy. This would likely mean that he would have to agree to pay most if not all of this Judgment—over what could be a substantial and perhaps unlimited number of years. And again, the Petitioner's incentives to work and support himself would be destroyed and his fresh start denied.

Id. at 873-74; see also *In re Mastroeni*, 56 Bankr. 456, 459 (Bankr. S.D.N.Y. 1985) (Although "there is no statutory reason why an individual consumer debtor may not seek reorganizational relief under Chapter 11 . . . Chapter 11 does not appear to be an acceptable alternative to relief under Chapter 7.").

It should also be noted that, under limited circumstances, debtors may now file under Chapter 12, which was added to the Code on October 27, 1986. See *supra* notes 3, 10.

²²⁴ See *infra* notes 225-393 and accompanying text.

²²⁵ See 11 U.S.C. § 1325 (1982 & Supp. III 1985). Section 1325(a) established six basic requirements for confirmation of a Chapter 13 plan: the plan must comply with the provisions of the Code, pay applicable fees, be proposed in good faith and not by any means forbidden by law, pay unsecured creditors at least what they would receive in a Chapter 7 case, pay secured creditors at least the value of the liens securing their claims, and be able to be completed in accordance with its terms. For an overview of the confirmation requirements, see A. COHEN, *supra* note 1, at 242-57.

Credit Amendments except to the extent that subsection (a) was made subject to an entirely new provision—subsection (b).²²⁶ Subsection (b) is divided into two parts.²²⁷ Subpart (1) prohibits the court from confirming a Chapter 13 plan over the objections of a trustee or unsecured creditors unless either the unsecured creditors will be paid in full *or* the debtor will apply to plan payments all of her projected disposable income for the three year period commencing on the date the first payment is due.²²⁸ Although Chapter 13 plans vary²²⁹ and priority claims must be paid ahead of other claims,²³⁰ it is likely that in most instances at least a portion of the debtor's projected disposable income (to the extent that there is any such income) will inure to the benefit of her unsecured creditors.²³¹ Subpart (2) defines "disposable income" as that

²²⁶ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356 (codified as amended at 11 U.S.C. § 1325 (Supp. III 1985)).

²²⁷ 11 U.S.C. § 1325(b) (1982 & Supp. III 1985) provides:

(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, 'disposable income' means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; or

(B) if the debtor is engaged in business, for the payment of the expenditures necessary for the continuation, preservation, and operation of such business.

²²⁸ See *id.* For some insight into the difficulties of determining whether a creditor has been paid in full for purposes of this new subsection, see Morris, *supra* note 16, at 153-55.

²²⁹ Cf. 11 U.S.C. § 1322(a), (b) (1982 & Supp. III 1985). The Code requires that a Chapter 13 plan contain certain provisions and permits such a plan to contain other provisions that are discretionary. Therefore, while all Chapter 13 plans must contain a certain category of provisions (although there can be considerable variation in these provisions themselves—for example, the dollar amounts distributed and the specific mechanisms drafted for implementing distributions can be different), there is considerable latitude in terms of the nonmandatory provisions. For a sample Chapter 13 plan, see D. EPSTEIN & J. LANDERS, DEBTORS AND CREDITORS 391-95 (2d ed. 1982).

²³⁰ See 11 U.S.C. § 1322(a)(2) (1982 & Supp. III 1985).

²³¹ This assumes that the debtor will have some disposable income. If the debtor has no disposable income, the question will be the same as that which existed under the Code prior to the Amendments, namely, whether courts should approve zero payment plans as not having been proposed in "good faith" as required by 11 U.S.C.

income that is not reasonably necessary for the support and maintenance of the debtor and her dependents.²³² Section 1325(b), therefore, superimposes upon the six specific conditions for confirmation of a Chapter 13 plan set forth in section (a)²³³ a new condition, namely, that a debtor who is not repaying her unsecured creditors in full must, if creditors object to confirmation,²³⁴ allocate to plan payments that portion of her projected income for the forthcoming three years that is above the amount deemed by a court to be necessary for the support and maintenance of the debtor and her dependents.²³⁵

Section 1325(b) can be viewed as amending subsection 1325(a)(4)²³⁶ by virtue of the exception contained in the prefatory language of section 1325(a).²³⁷ Subsection 1325(a)(4) permits confirmation of a Chapter 13 plan if the plan, in addition to satisfying the other

§ 1325(a)(3) (1982). For an overview of the manner in which pre-Amendments zero payment plans were treated by the different courts, see Note, *Good Faith, Zero Plans, and the Purposes of Bankruptcy Code Chapter 13: A Legislative Solution to the Controversy*, 61 B.U.L. REV. 773 (1981).

²³² See 11 U.S.C. § 1325(b)(2)(A) (1982 & Supp. III 1985). For purposes of this Article, the focus will be on Chapter 13 cases in which the disposable income is not being used for business purposes. See 11 U.S.C. § 1325(b)(2)(B) (1982 & Supp. III 1985) (providing that disposable income does not include income reasonably necessary for business purposes). While Chapter 13 may be utilized to reorganize small businesses in the form of sole proprietorships, see 11 U.S.C. § 109(e) (1982); see also 11 U.S.C. § 101(27) (1982 & Supp. III 1985) (defining "individual with regular income"), this Article addresses the use of Chapter 13 by individuals in a nonbusiness capacity, if only because issues of personal freedom and voluntariness take on greater significance in such a context.

²³³ See 11 U.S.C. § 1325(a) (1982 & Supp. III 1985); *supra* note 225.

²³⁴ In all likelihood, creditors will object to confirmation in every instance where they are not being repaid in full *unless* the Chapter 13 plan somehow provides payments in excess of what the debtor's disposable income for the succeeding three years will be. Unless a Chapter 13 plan is being funded by an outside source, it is unlikely that payments under a debtor's plan will ever exceed the debtor's projected disposable income. It is, of course, possible that creditors will object to the debtor's plan as originally proposed only when the financial difference between what is proposed under the Chapter 13 plan and what could be obtained under § 1325(b) is great and would warrant the creditors spending the time and money to pursue the matter. The creditors could, however, alert the trustee to the need to object and, hence, the creditors could avoid the direct cost of objection. See Morris, *supra* note 16, at 149-53.

²³⁵ See 11 U.S.C. § 1325(b)(2)(A) (1982 & Supp. III 1985).

²³⁶ 11 U.S.C. § 1325(a)(4) (1982 & Supp. III 1985) provides:

(a) Except as provided in subsection (b), the court shall confirm a plan if—

...
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date

²³⁷ See *supra* note 225 and accompanying text.

conditions of section 1325(a), would enable creditors to receive at least as much as they would have received in a Chapter 7 case. Termed the "best interests" test,²³⁸ subsection 1325(a)(4) is based on the principle that creditors are entitled only to the value of the debtor's non-exempt assets. In sharp contrast, but without formally deleting the best interests test, the addition of section 1325(b) significantly raises the minimum amount necessary for confirmation of a Chapter 13 plan. How high the benchmark may be for confirmation depends upon how expansively one interprets the term "projected disposable income." However the term is construed, compliance with the best interests test will no longer be sufficient.²³⁹ On the other hand, as pointed out, simply because one satisfies section 1325(b) does not mean section 1325(a)(4) has been satisfied.²⁴⁰

Section 1325(b) also may be viewed as clarifying the area of considerable judicial confusion concerning the application of Subsection 1325(a)(3).²⁴¹ In the plethora of cases construing that subsection, courts had looked to a number of factors to determine whether a debtor's Chapter 13 plan was proposed in good faith. The basic test, albeit with a host of variations, became whether the plan constituted an abuse of the purposes, spirit, or provisions of Chapter 13.²⁴² The courts consid-

²³⁸ "[B]est interests of the creditors" was the phrase used in the provision of the Bankruptcy Act of 1898 that was the predecessor to 11 U.S.C. § 1325(a)(4). See Bankruptcy Act of 1898, ch. 541, § 12(d)(1), § 656(a)(2), 30 Stat. 544, 550. The phrase was also used in the provision pertaining to confirmation of Chapter XI plans. *Id.* § 366(2), 30 Stat. at 550.

²³⁹ The benchmark will be higher only if there is any projected disposable income. If the debtor utilizes all of her income to support herself and her dependents, then there will be no sums available to fund the Chapter 13 plan. This would create the same issue that arose in the context of pre-Amendments § 1325(a), namely, whether a court should confirm a zero or minimal payment plan if creditors would get nothing in a Chapter 7 case. Ironically, § 1325(b) was designed, at least in part, to eliminate the possibility of minimal repayment plans under Chapter 13. See *supra* notes 69-75 and accompanying text. What becomes evident is that § 1325(b) asks the same question that pre-Amendments § 1325(a) did, albeit in a different way: Can a Chapter 13 plan be confirmed if there is no projected disposable income? Courts may be unwilling to say that a Chapter 13 plan is proposed in good faith (the requirement of § 1325(a)(3)), even if § 1325(b) is deemed satisfied. Therefore, we have not solved nor progressed far from the issues under § 1325(a) that plagued debtors, creditors, and courts. See *supra* notes 69-72 and accompanying text. But see *In re Green*, 60 Bankr. 547, 554 (Bankr. C.D. Cal. 1986) (legislative history to § 1325(b) indicates that a Chapter 13 plan does not always have to result in substantial repayment); *In re Tinneberg*, 59 Bankr. 634, 635 n.1 (Bankr. E.D.N.Y. 1986) (nominal or zero payment plans may be evidence of bad faith, but do not constitute bad faith per se).

²⁴⁰ See *In re Chinichian*, 784 F.2d 1440, 1443-44 (9th Cir. 1986) (each element of § 1325 must be satisfied before a court may approve a plan).

²⁴¹ For a discussion of the confusion encountered in the application of § 1325(a)(3), see *supra* notes 69-73 and accompanying text.

²⁴² See, e.g., *In re Terry*, 630 F.2d 634, 635 (8th Cir. 1980) (per curiam); *In re Kull*, 12 Bankr. 654, 659 (Bankr. S.D. Ga. 1981), *aff'd sub nom.* *Kitchens v. Georgia*

ered, among other factors, whether a debtor was making an honest effort to repay creditors.²⁴³ In making this determination, courts looked to, among other things, the amount of a debtor's projected earnings.²⁴⁴ For example, courts refused to confirm a Chapter 13 plan where only a limited portion of a debtor's monthly surplus income was being allocated to creditors.²⁴⁵ Section 1325(b) seeks to eliminate the flexibility once accorded courts in determining good faith²⁴⁶ by mandating a minimum standard of good faith, namely, the payment to creditors of *all* of the debtor's disposable income. Although satisfaction of the requirements of section 1325(b) is not necessarily synonymous with a finding of good faith under subsection 1325(a)(3)²⁴⁷ the inability to comply with section 1325(b) would appear presumptively demonstrative of a lack of good faith under subsection 1325(a)(3).

Although some view the ultimate version of the Consumer Credit Amendments as less detrimental to debtors than prior drafts,²⁴⁸ section 1325(b) imposes a minimum statutory standard of good faith that, when applied, can be far more detrimental to debtors than the prior drafts would have been. As previously noted, earlier drafts would have required that the debtor's Chapter 13 plan represent the debtor's good faith, or her best or bona fide effort—standards that would have contin-

R.R. Bank & Trust Co., 702 F.2d 885 (11th Cir. 1983); *accord In re Burns*, 6 Bankr. 286, 288 (Bankr. D. Colo. 1980); *In re Tanke*, 4 Bankr. 339, 340 (Bankr. D. Colo. 1980); *In re Cloutier*, 3 Bankr. 584, 587 (Bankr. D. Colo. 1980).

²⁴³ See *In re Hurd*, 4 Bankr. 551, 560 (Bankr. W.D. Mich. 1980); *In re Iacovoni*, 2 Bankr. 256, 268 (Bankr. D. Utah 1980).

²⁴⁴ The court in *In re Iacovoni*, 2 Bankr. at 258, set out a four-point test that made the question of whether the proposed payment was "meaningful" contingent upon four separate evaluations, of which the second was the future income and payment prospects of the debtor. See also *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982) (debtor's future income); *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982) (factors analyzed include "the debtor's employment history and prospects"); *In re Kull*, 12 Bankr. at 659 ("the ability of the debtor to earn and the likelihood of future increase or diminution of earnings").

²⁴⁵ See, e.g., *In re Long*, 10 Bankr. 880, 883 (Bankr. D.S.D. 1981); *In re Schon-galla*, 4 Bankr. 360, 363 (Bankr. D. Md. 1980).

²⁴⁶ This flexibility is reflected in *In re Rimgale*, 669 F.2d 426, 431 (7th Cir. 1982) (emphasis added) (stating that "'good faith' will have to be defined on a case-by-case basis . . . in the administration of Chapter 13's provisions"); *accord In re Kull*, 12 Bankr. at 658 (In any Chapter 13 proceeding, "[e]ach case must be judged on its own facts."); *In re Burrell*, 6 Bankr. 360, 366 (Bankr. N.D. Cal. 1980) (The bankruptcy court cannot impose inflexible standards and "should proceed on a case-by-case basis.").

²⁴⁷ It is still possible to argue that to satisfy the good faith requirement under § 1325(a)(3), the debtor must pay creditors 70% of their outstanding indebtedness, by analogy to § 727(a)(9). Section 727, however, deals with discharge in Chapter 7, not Chapter 13. See *supra* note 72.

²⁴⁸ See statements of Senators Metzenbaum and Kennedy, *supra* note 78.

ued to permit considerable judicial discretion.²⁴⁹ By contrast, section 1325(b) appears to prescribe a specific test of good faith based upon payments out of future earnings. Accordingly, such earnings become the *sine qua non* of confirmation of a Chapter 13 plan.

Because confirmation of a Chapter 13 plan is the statutory prerequisite to a Chapter 13 discharge, the addition of section 1325(b) has made such relief more difficult for a debtor to obtain. Although not rising to the dignity of a constitutional right,²⁵⁰ the discharge of an individual's debts in Chapter 13 has always been viewed as among the essential features of bankruptcy policy and, particularly, the policy behind Chapter 13.²⁵¹ First, the expanded scope of the discharge available under Chapter 13, which is considerably broader than that available under any other chapter of the Code, suggests the significance that the Code has placed on a debtor's ability to obtain a discharge under Chapter 13.²⁵² Second, Congress attempted through Chapter 13 to encourage individuals to repay their creditors voluntarily from future income, thereby preserving a debtor's self-respect while simultaneously maximizing recoveries to creditors.²⁵³ For example, under Chapter 13, unlike Chapter 11, unsecured creditors can neither propose nor vote to accept or reject a debtor's repayment plan.²⁵⁴ As such, great weight is

²⁴⁹ See *supra* notes 69-73 and accompanying text.

²⁵⁰ See *United States v. Kras*, 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.").

²⁵¹ See *supra* note 2.

²⁵² The confirmation of a Chapter 13 plan discharges the debtor from all debts under 11 U.S.C. § 1322(a) (1982 & Supp. III 1985), except for obligations that are not fully paid until after the plan is completed, see 11 U.S.C. § 1322(b)(5) (1982), and spousal or child support obligations, see 11 U.S.C. § 523(a)(5) (1982 & Supp. III 1985). The discharge obtained in a Chapter 13 proceeding is substantially broader than the discharge available under Chapter 7. Compare 11 U.S.C. § 1328(a) (1982) (discharging all debts except uncompleted scheduled payments and spousal support obligations) with 11 U.S.C. § 523(a) (1982) (Discharge does not include release from government-made or insured educational loans, tort liabilities, or taxes.). This disparity has caused considerable debate in the case law. See *In re Estus*, 695 F.2d 311, 313-16 (8th Cir. 1982) (summarizing the judicial and legislative debate); *In re Dalby*, 38 Bankr. 107, 111 (Bankr. D. Utah 1984) (student loan debt dischargeable under Chapter 13 but not Chapter 7 and, thus, militated against Chapter 13 discharge); *In re Gunn*, 37 Bankr. 432, 435 (Bankr. D. Or. 1984) (existence of student loan debt that is not dischargeable under Chapter 7 is one factor to be considered in denying discharge under Chapter 13); *In re Johnson*, 36 Bankr. 67, 69 (Bankr. S.D. Ill. 1984) (fact that 84% of debtor's unsecured debt was comprised of educational loans otherwise nondischargable in a Chapter 7 case was evidence of "misuse of process"); *In re Scher*, 12 Bankr. 258, 267-73 (Bankr. S.D.N.Y. 1981) (summarizing the debate in Congress).

²⁵³ See, e.g., 11 U.S.C. §§ 1322(b) (giving debtor discretion as to framing of the Chapter 13 plan), 1325 (providing that plan will be confirmed, subject to the exceptions, all of which are protective of creditors' interests, enumerated in this section) (1982 & Supp. III 1985).

²⁵⁴ As to creditors' rights in Chapter 13 pertaining to the filing of the plan, see 11 U.S.C. § 1325 (1982 & Supp. III 1985). As to the creditors' rights in Chapter 11, see

placed on the debtor's choice of a repayment plan, as opposed to a plan imposed by creditors. Similarly, before the adoption of the Amendments, the Code permitted a court to confirm and bind creditors by a Chapter 13 plan that satisfied the requirements of section 1325(a), whether or not the creditors were satisfied by the specific provisions of the plan. In addition, several of the prior drafts of the Amendments, as well as other provisions of the Amendments, contain incentives for the use of Chapter 13.²⁵⁵

The significance of a discharge to an individual debtor is also evidenced by the fact that the Code does not permit enforcement of prepetition contractual provisions under which an individual debtor may have waived her right to a discharge.²⁵⁶ An individual may contract away many rights when negotiating with her creditors, but the right to a discharge is deemed so sacrosanct that Congress elected to subordinate contractual freedom so that individual debtors might be encouraged by the prospects of what could be accomplished under the federal bankruptcy laws. The nonenforceability of any contractual provision represents an intrusion into free bargaining based upon a choice of values. In this instance, the choice is between: (i) preserving an individual debtor's opportunity for a discharge in the hopes that this will preserve her self-respect and maximize recovery to *all* creditors, and (ii) preserving the sanctity of a contractual provision designed to maximize the recovery of a *single* creditor.²⁵⁷ By favoring the collective approach, the federal bankruptcy laws protect the interests of the maximum number of creditors while denying to the individual debtor the right to alienate her most precious asset—herself.²⁵⁸

The Code's effort to preserve the voluntariness of Chapter 13 also is reflected in the fact that Chapter 13 cases can be filed only voluntarily.²⁵⁹ Creditors cannot commence an involuntary Chapter 13 case against a debtor.²⁶⁰ In addition, debtors can convert their cases under

11 U.S.C. §§ 1126, 1129 (1982 & Supp. III 1985).

²⁵⁵ See *supra* notes 67-73 and accompanying text.

²⁵⁶ 11 U.S.C. § 1328(a) (1982) allows for the approval of the debtor's waiver only if it is in writing and executed after the order for relief. The court may not approve a debtor's prepetition waiver of her right to a discharge. For a discussion of this issue, see T. JACKSON, *supra* note 1, at 230-48.

²⁵⁷ Limitations on contractual freedom are by no means new. See G. GILMORE, *DEATH OF CONTRACT* (1974); Kronman, *supra* note 14.

²⁵⁸ For a general discussion of the social policy behind the nonwaivability of a discharge in bankruptcy, see D. BAIRD & T. JACKSON, *CASES, PROBLEMS AND MATERIALS ON BANKRUPTCY* 732-42 (1985); Jackson, *supra* note 1, at 1398-1404; Kronman, *supra* note 14, at 776, 785-86.

²⁵⁹ See 11 U.S.C. §§ 301, 303(a) (1982).

²⁶⁰ See 11 U.S.C. § 303(a) (1982); see also *In re Graham*, 21 Bankr. 235, 238 (Bankr. N.D. Iowa 1982) (denying creditor's motion to convert the case from Chapter

Chapters 7 or 11 to Chapter 13 without notice and a hearing.²⁶¹ Creditors, on the other hand, are expressly prohibited from converting cases pending under Chapters 7 or 11 to Chapter 13.²⁶² Further evidence of this effort is reflected in the Code provisions prohibiting enforcement of a debtor's contractual waiver of her right to convert her Chapter 7 case to Chapter 13 and vice versa.²⁶³ Enforcement of a contractual waiver of the right to dismiss a Chapter 13 case is also expressly precluded by statute.²⁶⁴ By preventing enforcement of these waivers, the Code again reinforces the significance of the debtor's free choice and promotes the debtor's use of federal bankruptcy law in preference to state law. Like the prohibition against enforcement of a waiver of discharge, the prohibition with respect to waivers of conversion and dismissal represents a choice between preserving an individual debtor's opportunity to choose the mechanism under which she will repay creditors and preserving the sanctity of contract.

To the extent that the adoption of section 1325(b) erodes the voluntariness of Chapter 13 and diminishes the impact of the unenforceability of contractual waivers of discharge and conversion, Congress may have created a disincentive for the debtor to use Chapter 13, particularly if the term "projected disposable income" is interpreted expansively.²⁶⁵ Such a result runs contrary to the entire purpose of Chapter 13 as well as various other provisions of the Code.²⁶⁶

7 to Chapter 13 because to do so would have the effect of an involuntary Chapter 13 case and thus be contrary to legislative intent); *In re Noonan*, 17 Bankr. 793, 799 (Bankr. S.D.N.Y. 1982) ("Congress acted to dispel even the remotest possibility of involuntary servitude by prohibiting involuntary Chapter 13 cases.").

²⁶¹ See 11 U.S.C. §§ 706(a), (c), 1112(d) (1982).

²⁶² See 11 U.S.C. §§ 706(b), (c), 1112(d) (1982).

²⁶³ See 11 U.S.C. §§ 706(a), 1307(a) (1982).

²⁶⁴ See 11 U.S.C. § 1307(b) (1982 & Supp. III 1985).

²⁶⁵ If there is any validity to the creditors' assertion that the rise in filings post-1978 was directly correlated to the liberalized provisions in the Code, see *supra* notes 57-66 and accompanying text, then the result of the Consumer Credit Amendments should be to diminish, not increase, filings under Chapter 13. Creditors may find, although there are no statistics on this issue as of yet, that the methods utilized to increase distributions to creditors may accomplish the opposite, see *supra* note 35 and accompanying text, and in the process sacrifice aspects of individual freedom as well. See Sullivan, Warren & Westbrook, *supra* note 10, at 311-35 for at least a preliminary analysis of whether most debtors can successfully meet the requirements of a Chapter 13 plan. The authors suggest that some particularly well-situated debtors might be able to complete a reorganization successfully, but argue that other debtors would find such requirements almost "impossible" to meet. See *id.* at 334; see also Breitowitz, Installment II, *supra* note 19, at 67 (arguing that debtors who are forced to apply all of their disposable income to pay their creditors will either seek modification or dismissal of their Chapter 13 plans, leaving to creditors "the little they can eke out" through state garnishment laws).

²⁶⁶ Prior to the Consumer Credit Amendments, a Chapter 13 plan could be confirmed if the requirements of § 1325(a) were satisfied. As noted in 5 COLLIER ON

A. *The Expansive Paradigm*

The effects of section 1325(b) are intensified if the term "projected disposable income" is expansively construed. Unlike section 707(b), section 1325(b) at least includes a partial definition of the key term used.²⁶⁷ Nevertheless, the term "disposable income" is capable of varying interpretations and, like the term "substantial abuse" in section 707(b), can be broadly or narrowly construed. This is due, in major part, to the fact that the definition relies on terms that are themselves subjective, such as "reasonably necessary."²⁶⁸ Moreover, the word "projected," which is used in conjunction with the term "disposable income," is not defined at all.

Proponents of an expansive paradigm begin by noting that a determination of disposable income requires, as in the context of substantial abuse, value judgments with respect to lifestyle.²⁶⁹ As in the determination of substantial abuse, a determination of the amount of disposable income might well permit a court to substitute its own judgment for that of the debtor as to the propriety of the type and amount of the debtor's expenditures.²⁷⁰ If a court finds that a particular debtor is spending more to support her family than the court deems necessary, it can demand that the debtor decrease these expenditures as the "price" for a discharge.²⁷¹ By correspondingly increasing the amount of the debtor's disposable income, the court thus will have increased the available assets for distribution under the Chapter 13 plan, at least a portion of which will inure to the benefit of unsecured creditors.

An example of the difficulties inherent in such an approach is reflected in *In re Gunn*²⁷² where, in the context of determining whether a Chapter 13 plan was proposed in good faith under subsection 1325(a)(3), the court observed that two married debtors going to school in different cities would have fewer living expenses upon completion of

BANKRUPTCY § 1325.01[1] (L. King ed. 1985) (footnotes omitted), "The Code and its legislative history are emphatic that confirmation is not discretionary with the court once these criteria [contained in § 1325(a)] have been satisfied."

²⁶⁷ Compare 11 U.S.C. § 1325(b)(2) (1982 & Supp. III 1985) (defining "disposable income") with 11 U.S.C. § 707(b) (1982 & Supp. III 1985) (no definition of "substantial abuse").

²⁶⁸ See 11 U.S.C. § 1325(b)(2) (1982 & Supp. III 1985).

²⁶⁹ See *In re Rogers*, 65 Bankr. 1018, 1020-22 (Bankr. E.D. Mich. 1986); *In re Kitson*, 65 Bankr. 615 (Bankr. E.D.N.C. 1986); *In re Red*, 60 Bankr. 113, 116 (Bankr. E.D. Tenn. 1986); *In re Jones*, 55 Bankr. 462, 465-67 (Bankr. D. Minn. 1985).

²⁷⁰ See, e.g., cases cited *supra* note 269.

²⁷¹ As stated by the court in *In re Rogers*, 65 Bankr. at 1022, the debtor was merely "pampering her own psyche at the expense of unsecured creditors."

²⁷² 37 Bankr. 432 (Bankr. D. Or. 1984).

their education because they would be able to live together. Based in part on this observation, the court concluded that the debtors' current level of expenditures was merely temporary and that payments under the debtors' plan should be increased.²⁷³ Such a determination does not address the issue of what would happen if the debtors *preferred* to continue living apart after they completed school.

While the particular judge in question may not favor this new social phenomenon, one is forced to ask whether a court, in its effort to benefit creditors, should be empowered to dictate how a debtor ought to live.²⁷⁴ In fact, it is the creditors who will raise objections to confirmation that are the real framers of the debtor's future lifestyle. While many of the decisions under subsection 1325(a)(3), as noted earlier, addressed the amount a debtor proposed to pay, based on future earnings, and some spoke specifically to how expenses were to be calculated,²⁷⁵ many cases did not focus as directly on a debtor's expenditures.²⁷⁶ The language of section 1325(b) places an unmistakable emphasis on the calculation of disposable income which, in turn, requires an investigation of the debtor's expenditures.

Courts have long struggled, in cases not brought in the context of bankruptcy, with making determinations of income and expenditures. For example, in determining what portion of a debtor's wages should be garnished, state courts have looked at what amount a debtor needs to support herself and her family and in some instances have precluded

²⁷³ See *id.* at 436. The court also objected to the level of the debtor's expenditures. See *id.* at 435.

²⁷⁴ As Jacob I. Weinstein stated at the 1932 hearings:

There is no man who will see eye to eye with the other man as to how he should live, and I would resent any person, court or otherwise, telling me under those circumstances as to whether, for instance, if I have a boy going to school and I go through bankruptcy, I should stop that boy's career in school.

Hearings on a Uniform System of Bankruptcy, 72nd Cong., 1st Sess. 753 (1932). A similar sentiment was expressed by Senator Metzenbaum, who stated in connection with a future income test:

It would have forced bankruptcy judges to become soothsayers and engage in the impossible task of predicting someone's earnings and financial obligations; Bankruptcy relief would have become hostage to a judge's guesses about how much an individual would earn, what their financial burdens would be, whether they would become sick, unemployed, and so on. In some cases, because judges are human, they simply would be wrong.

130 CONG. REC. S7624 (daily ed. June 19, 1984); see also *In re Kitson*, 65 Bankr. 615, 615-21 (Bankr. E.D.N.C. 1986) ("This court [is hesitant] about deciding how individuals should live their lives.").

²⁷⁵ See Boshkoff, *supra* note 1, at 120-22 (discussing and criticizing cases in which judges specifically noted types of expenses they considered inappropriate).

²⁷⁶ See *supra* notes 241-47 and accompanying text.

garnishment of these amounts.²⁷⁷ Recognizing the difficulties inherent in such determinations, most garnishment statutes now permit garnishment based on a percentage of total income,²⁷⁸ thereby eliminating or minimizing the need for subjective evaluations of expenditures.

Similar issues arise in the context of alimony and child support decrees where family courts routinely determine how much a supporting spouse is required to pay to support her former spouse and children. In making judgments in this context, courts have regularly looked at such items as the amount the spouse is capable of paying, including an evaluation of such spouse's past, present, and future earning capacity.²⁷⁹ While some courts have advised spouses that the essential test is not what the supporting spouse deigns to earn but what she is capable of earning in view of her capabilities,²⁸⁰ one theme that arises in these decisions is the courts' sensitivity to a spouse's past lifestyle. In determining alimony and child support payments, courts do not disregard a supporting spouse's choices as to lifestyle in favor of a judicial determination of how a supporting spouse ought to live.²⁸¹

Despite the models in other areas of law that have moved courts away from making subjective decisions about lifestyle, the legislative history accompanying prior versions of the Consumer Credit Amendments suggests a very different approach—one that has had considerable appeal among those courts that have decided cases under section 1325(b).²⁸² In attempting to tighten the standards for confirmation of a Chapter 13 plan, the proponents of the legislation specifically identified the need for debtors to alter their lifestyles.²⁸³ For example, in explain-

²⁷⁷ See, e.g., CAL. CIV. PROC. CODE § 690.6 (West 1970) (repealed 1980); IDAHO CODE § 11-604(2) (1975).

²⁷⁸ The Federal Government has put a ceiling on the amount above which the state garnishment statutes may not exceed. Generally, the ceiling is 25% of the individual's disposable weekly income, with exceptions for court-ordered spousal or child support payments. See 15 U.S.C. § 1673 (1982).

²⁷⁹ See, e.g., *In re Marriage of Dennis*, 117 Wis. 2d 249, 275, 344 N.W.2d 128, 140 (1984) (Abrahamson, J., concurring) (evaluating father's past, present, and future earning capacity to determine reasonableness of contempt order for failing to seek higher paying employment).

²⁸⁰ See *Brandt v. Brandt*, 36 Misc. 2d 901, 903, 233 N.Y.S.2d 993, 995 (N.Y. Sup. Ct. 1962).

²⁸¹ See, e.g., *id.* at 903, 233 N.Y.S.2d at 995; see also *In re Felisa L. D.*, 107 Misc. 2d 217, 220, 433 N.Y.S.2d 715, 717 (N.Y. Fam. Ct. 1980) (father's choice to be "house husband," instead of seeking employment, factored into determination to reduce his support obligations for prior marriage).

²⁸² See, e.g., *In re Rogers*, 65 Bankr. 1018 (Bankr. E.D. Mich. 1986); *In re Kitson*, 65 Bankr. 615 (Bankr. E.D.N.C. 1986); *In re Red*, 60 Bankr. 113, 116 (Bankr. E.D. Tenn. 1986); *In re Festner*, 54 Bankr. 532, 533-34 (Bankr. E.D.N.C. 1985).

²⁸³ See 126 CONG. REC. 31154 (1980).

ing that a Chapter 13 plan should represent a debtor's bona fide effort to satisfy the claims of creditors, one proponent stated:

It means that the debtor should forego luxuries during the term of the plan. For most debtors some sacrifice and adjustment to the debtor's standard of living will be required. There should be no such expenses as the purchase of new cars or for that matter continuing to make payments on a nearly new car at the expense of unsecured creditors under the plan. The court should . . . in some cases, require the debtor to pursue a more modest lifestyle.²⁸⁴

In fact, in portions of the "legislative history" accompanying the proposed amendments to subsection 1325(a)(3), it was suggested that courts make determinations of necessary expenditures in light of budgets maintained by the Bureau of Labor Statistics.²⁸⁵ The suggestion raises questions as to whether a debtor with income higher than the "lower living budget" should be required to adjust her lifestyle so as not to require expenditures above that of the lower living budget, even though this may require moving from a home to an apartment or from one neighborhood to another or placing one's children in public as opposed to private schools.²⁸⁶ The adoption by a court of the approach suggested in these pieces of the legislative history of prior but unadopted versions of the Consumer Credit Amendments would lead the court into the thicket of determining how individuals in financial trouble should live while repaying their creditors.

If the growing number of decisions is any indication of how the issues under section 1325(b) are going to be decided by future courts, then the fears outlined above of the consequences of an expansive interpretation are justified.²⁸⁷ In *In re Jones*,²⁸⁸ for example, the court determined that the expenses enumerated by the debtor were excessive and were not reasonably necessary for the support of herself and her family. These expenses included tuition for one child at a private college and tuition for another child at a private secondary school. Additional expenses criticized by the court included those for groceries and housing.²⁸⁹ In *In re Rogers*, the court objected to the debtor's retention

²⁸⁴ *Id.*

²⁸⁵ See S. REP. NO. 65, 98th Cong., 1st Sess. 22 (1983).

²⁸⁶ See *In re Jones*, 55 Bankr. 462, 467 (Bankr. D. Minn. 1985) (answering this question in the affirmative).

²⁸⁷ See, e.g., cases cited *supra* note 282.

²⁸⁸ 55 Bankr. 462 (Bankr. D. Minn. 1985).

²⁸⁹ See *id.* at 467.

of a 1984 Corvette.²⁹⁰ Similarly, in *In re Kitson*, the court objected to the amount the debtors expended for childcare. As that court stated, the debtors could not expect to "go first class" when "coach" was available.²⁹¹ And, in *In re Red*, the court objected to the debtor's charitable contributions.²⁹²

The *Jones* and *Kitson* courts' determinations were based, at least in part, on an analogy between section 1325(b) and subsection 522(d)(10)(E).²⁹³ The latter provision permits a debtor to treat as exempt property payments received under a pension or similar plan only if such payments are reasonably necessary for support.²⁹⁴ The standard utilized in several cases under this provision required that the amount be "sufficient to sustain basic needs not related to [the debtor's] former status in society or the life style to which he is accustomed"²⁹⁵ Adopting precisely this standard in the Chapter 13 context, the court in *Jones* denied confirmation of the debtor's Chapter 13 plan and observed:

I find that the list [of expenditures] includes several items that are not within the standard. . . . An expensive private school education is not a basic need of the Debtor's dependents, particularly in view of the high quality public education in this country at both the collegiate and secondary school levels. The \$515 per month that the Debtor claims for food for a family of four is high in my judgment. Lastly, the

²⁹⁰ *In re Rogers*, 65 Bankr. 1018, 1021-22 (Bankr. E.D. Mich. 1986).

²⁹¹ 65 Bankr. 615, 621-22 (Bankr. E.D.N.C. 1986).

²⁹² 60 Bankr. 113, 116 (Bankr. E.D. Tenn 1986).

²⁹³ See *Kitson*, 65 Bankr. at 619-20; *Jones*, 55 Bankr. at 466. The court in *Kitson* looked at other discharge provisions that utilize the same language—for example, 11 U.S.C. §§ 522(d)(10)(D), 522(d)(11)(B) (1982)—as well as at the standard applied in § 523 relating to the dischargeability of student loans. See 11 U.S.C. § 523(a)(8) (1982). For an example of the difficulty a debtor has in obtaining such a discharge, see *In re Marion*, [1985-86 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 71,223 (Bankr. W.D. Pa. May 30, 1986), where the court suggested that there was no hardship, as the debtor's wife did not work.

²⁹⁴ 11 U.S.C. § 522(d)(10)(E) (1982 & Supp. III 1985) (emphasis added) provides:

(d) The following property may be exempted under subsection (b)(1) of this section:

(10) The debtor's right to receive—

(E) a payment under a stock bonus, pension, profit-sharing annuity, or similar plan or contract on account of illness, disability, death, age, or length of service to the extent reasonably necessary for the support of the debtor or a dependent of the debtor.

²⁹⁵ *In re Taff*, 10 Bankr. 101, 107 (Bankr. D. Conn. 1981); accord *In re Kochell*, 732 F.2d 564, 566 (7th Cir. 1984) (quoting *Taff*, 10 Bankr. at 107).

monthly house payment of \$989 is well above the amount necessary to provide adequate housing for a family of four.²⁹⁶

Reference to exemption provisions such as subsection 522(d)(10)(E) for purposes of interpreting section 1325(b) is superficially appealing in light of the latter provision's inclusion of a statutory standard and the existence of case law interpreting virtually identical language.²⁹⁷ When examined further, however, the analogy is spurious. Section 522 addresses the determination of what property should be removed from the reach of creditors in any case involving individual debtors. It is, however, of decreasing significance, especially in light of the growing number of states that are "opting out" of the federal exemption scheme in favor of state-determined exemptions.²⁹⁸ Section 522 also is intended to limit the property that ultimately becomes part of an estate under the definition of "property of the estate" contained in section 541.²⁹⁹ A conclusion that payments under pension plans, for example, are not exempt in certain situations is not synonymous with a conclusion that those monies must be distributed to creditors in a Chapter 13 plan. It is the latter issue that is raised by section 1325(b). Property that forms the Chapter 13 estate is not necessarily the property that ultimately will be distributed to creditors. The purposes served by sections 522(d)(10) and 1325(b) are very different. Section 522(d)(10) establishes what a debtor *may keep* from her *existing assets* in any case under the Code (although of primary significance in a Chapter 7 case), but section 1325(b) determines what a debtor in Chapter 13 *must pay* out of her *future income*. To apply the standard governing what a debtor may keep out of her existing assets to the context of what the debtor must pay from her future income in a Chapter 13 case is thus

²⁹⁶ *In re Jones*, 55 Bankr. at 467.

²⁹⁷ The court in *In re Jones* fails to note that there are other exemption provisions that contain similar language. See, e.g., 11 U.S.C. §§ 522 (d)(10)(D), (d)(11)(B), (d)(11)(C) (1982). As noted above, these provisions were discussed in *In re Kitson*. See *Kitson*, 65 Bankr. 615, 619 (Bankr. E.D.N.C. 1986); see also Morris, *supra* note 16, at 158 (finding the analogy to the exemption sections appealing and, while acknowledging differences in the issues raised by §§ 522(d) and 1325(b), stating that "the same general approach seems appropriate for the determination of a debtor's reasonably necessary living expenses under a Chapter 13 plan").

²⁹⁸ See Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 27-28 (1983); see also E. WARREN & J. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 204 (1986) (Thirty-nine states have opted out as of 1986.).

²⁹⁹ See *In re Goff*, 706 F.2d 574, 579 (5th Cir. 1983), which states that property exempted pursuant to § 522 initially enters the estate and is subsequently excluded pursuant to the section's provisions.

inappropriate and unsound.³⁰⁰

An expansive interpretation of section 1325(b) also contradicts federal policy on wage garnishment. Bankruptcy literature abounds with references to the fact that one of the principal reasons that debtors utilize the federal bankruptcy laws is to avoid their creditors' threats.³⁰¹ Creditors frequently threaten to garnish a debtor's wages.³⁰² Fearing garnishment, the debtor seeks relief under the Code. Ironically, the threat of garnishment is considered to be of such significant force that it could propel a debtor into Chapter 13. Yet, Chapter 13 as amended contemplates, at least under the expansive paradigm, what might be termed "grand-scale garnishment."³⁰³ Unlike true garnishment, however, where the amount that can be garnished is limited by statute,

³⁰⁰ One should ask whether analogizing a debtor's ability to pay her debts out of future income to situations involving nondischargeable debt makes sense. At least one court and one commentator note that similar issues come up in both contexts. See *In re Kitson*, 65 Bankr. 615, 619-20 (Bankr. E.D.N.C. 1986); Boshkoff, *supra* note 1, at 116-20. Even if a particular debt is nondischargeable, however, it does not necessarily follow that the debtor must work to pay it off, although such working is at the heart of the Chapter 13.

³⁰¹ See BROOKINGS STUDY, *supra* note 34, at 47. The Federal government also protects consumers from potentially harmful creditor practices through other laws. See, e.g., Consumer Credit Protection Act, 15 U.S.C. § 1601 (1982); Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1982 & Supp. III 1985).

³⁰² See D. BAIRD & T. JACKSON, *supra* note 258, at 8.

³⁰³ Garnishment is generally defined as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(c) (1982). The purpose of garnishment is to enable the plaintiff (creditor) to subject to the payment of her claim property of the defendant (debtor) that is in the hands of third persons (debtor's debtor, usually her employer who owes her wages). See 38 C.J.S. *Garnishment* § 2, at 207 (1943). Federal law has set a virtually absolute ceiling, equal to 25% of one's wages, on the amount of those wages that are subject to garnishment. See 15 U.S.C. § 1673(a) (1982).

Section 1325(b) of the Bankruptcy Code is similar to garnishment in terms of both definition and purpose. The similarity ends when one realizes that § 1325(b) has no absolute ceiling. In fact, 15 U.S.C. § 673(b)(1)(B) (1982) provides an exception, applicable to Chapter 13 cases, to the federal garnishment ceiling. Although there is nothing in the legislative history of § 1673 to explain this exception, some explanation is found in the case of *Kokoska v. Belford*, 417 U.S. 642, 651 n.11 (1974), where the Court stated:

Petitioner argues that, since Ch. XIII of the Bankruptcy Act had been explicitly excluded from the scope of the Consumer Credit Protection Act . . . , it must have intended to include the other portions of the Bankruptcy Act. Chapter XIII permits a wage earner to satisfy his creditors out of future income under a supervised plan. This particular procedure resembles the normal credit situation to which the CCPA is directed more than other bankruptcy situations and, for this reason, the CCPA was not enforced at the expense of the Bankruptcy procedures.

It is also noteworthy that a Chapter 13 plan cannot extend beyond five years, see 11 U.S.C. § 1329(c) (1982), whereas a garnishment can continue for the life of the judgment.

there is no maximum level of garnishment in the Chapter 13 context.³⁰⁴ Creditors could obtain all of the debtor's projected disposable income if that is what they needed to be repaid in full. The key limitation on garnishment statutes, namely that creditors can obtain no more than twenty-five percent of a debtor's disposable earnings,³⁰⁵ is conspicuously absent from the requirements of Chapter 13. In fact, even if a debtor's expenses are not cut back by a court as a precursor to confirmation, the amount of projected disposable income applied to payments under a Chapter 13 plan could exceed the federal ceiling.

It is noteworthy that this result does not present a direct conflict in the Consumer Credit Protection Act (CCPA), which establishes a ceiling on garnishment. Section 303(b)(1)(B) of that Act explicitly provides that garnishment restrictions are not applicable to orders of a court in Chapter 13 cases.³⁰⁶ The legislative history of this specific provision within the CCPA is sparse, but there is every indication that the Act as a whole was designed to rectify the severe negative impact of garnishment on individuals.³⁰⁷ Although it is not explicitly stated, a corollary is that these debtor protections are not necessary in the context of a Chapter 13 case because Chapter 13 is voluntary.³⁰⁸ A debtor elects to file and then determines how much of her future income she wishes to allocate to her creditors.

The rationale for the limited exception to section 303 of the CCPA is thus undermined by an expansive interpretation of the Consumer Credit Amendments. The purpose behind the exception is eradicated because under an expansive interpretation Chapter 13 is not completely voluntary and a debtor's ability to choose how much income she wishes to allocate to her creditors is significantly restricted.³⁰⁹ Congress could not have intended to undermine the CCPA by permitting unlimited garnishment when it is this very issue that causes individuals to seek relief under the Code in the first instance.³¹⁰ The Code should, if anything, further the policy of eradicating excessive garnishment rather than promoting it under the expansive paradigm. Given the purposes of the CCPA, it seems much more reasonable to require that the amount

³⁰⁴ 11 U.S.C. § 1325(b) (1982 & Supp. III 1985) requires that the debtor pay *all* of her disposable income. See *supra* note 227.

³⁰⁵ See 15 U.S.C. § 1673(a) (1982).

³⁰⁶ See Consumer Credit Protection Act, § 303(b)(1)(B), 15 U.S.C. § 1673(b)(1)(B) (1982).

³⁰⁷ See *Kokoska v. Belford*, 417 U.S. 642, 650-51 (1973); *Long Island Trust Co. v. United States Postal Serv.*, 647 F.2d 336 (2d Cir. 1981).

³⁰⁸ See *supra* notes 259-64 and accompanying text.

³⁰⁹ See *supra* notes 267-71.

³¹⁰ See *supra* note 307 and accompanying text.

of projected disposable income applied to plan payments in a Chapter 13 case should never exceed twenty-five percent of the debtor's income. This approach would reconcile the Code with the philosophy of the CCPA.³¹¹

B. *The Narrow Paradigm*

Section 1325(b) does not mandate the expansive interpretation suggested above. In *In re Otero*,³¹² one court attempted to circumvent the difficulties inherent in a broad interpretation of section 1325(b) by finding that the section is a discretionary rather than mandatory provision. In *Otero*, the court confirmed a Chapter 13 plan pursuant to which the debtor would retain \$117 per month above his listed expenditures.³¹³ As expressed by the court:

This Court notes that the statute reads "court *may* not approve." The term *may* possess a voluntary tone, a majority of the time as opposed to "shall." In the above statute, Congress could have made the section mandatory. However, this was not done. Therefore, this Court reads the section as a voluntary section to be applied at the Court's discretion.

The Court further finds that a difference of \$117.00 a month is not a significant or substantial amount to be extracted from the debtors. It was not intended to take the last son [sic]. A cushion of money is necessary in Chapter 13 budgeting to guard against life's unexpectancies. It is not in the public interest to squeeze the last dollar from Chapter 13 debtors to fund a Chapter 13 plan.³¹⁴

Although the court in *Otero* clearly recognized that Chapter 13 provides a method of repaying creditors while insuring that the debtor survives "as a human being" and that there is nothing inherently wrong in filing a Chapter 13 case as a method of repaying creditors, the court arrived at these correct conclusions by an incorrect route. The court reasoned that, if section 1325(b) was intended to be mandatory, it

³¹¹ Admittedly, one might argue that applying this standard is problematic in light of the fact that § 303 explicitly contemplates an exception to its terms for Chapter 13 plans. However, as noted, the exception might well be read to reflect a presumption of voluntariness under Chapter 13. Where the presumption is not respected, the exception fails of its purpose. Thus, the application of a rule preserving the voluntariness of a debtor's plan becomes a necessity.

³¹² 48 Bankr. 704 (Bankr. E.D. Va. 1985).

³¹³ *Id.* at 708.

³¹⁴ *Id.*

would have employed the verb form "shall" instead of "may."³¹⁵ Such an interpretation plainly ignores section 102(4) of the Code, entitled "Rules of Construction," which expressly states that the term "may not" is prohibitive, not permissive.³¹⁶ Therefore, by the Code's own interpretive guidelines, section 1325(b) is mandatory. Thus, another means to the correct end must be found.

Another approach to section 1325(b)—one fully consistent with Code language—would be to construe the terms "projected" and "disposable income" narrowly.³¹⁷ In determining disposable income, for example, a court could elect not to substitute its judgment for that of the debtor with respect to expenditures. Hence, the court would not evaluate the debtor's expenditures absent some objective evidence of grossly excessive spending. This determination would be based neither on what the court or a creditor believes to be inappropriate nor on the basis of federal guidelines for particular income levels. Rather, the court's determination would be based on what the debtor's expenditures have been in the past under her established lifestyle and whether the projected expenditures are reasonable in that light.

The initial determination by a court to look at a debtor's expenditures merely because they seem "excessive," even if they fall within the debtor's existing lifestyle, is obviously subjective. The judge's subjective analysis, however, applies to a narrower range of issues than those considered under the expansive paradigm. The court would not determine whether the debtor has the right to spend money in the first instance, but rather how much should be spent. Consider the court's observation in *In re Grant*³¹⁸ that a debtor should not send his college-aged son \$400 per month. While it might be argued as a matter of childrearing that the son in *Grant* is old enough to work and should no longer be financially tied to his parents, it is not the court's place to make that assessment. On the other hand, if a mother is sending her daughter \$4000 per month, a court could and should take a closer look at this

³¹⁵ See *id.*

³¹⁶ See 11 U.S.C. § 102(4) (1982).

³¹⁷ In that light, the term "dependent" should be broadly construed so as to allow a debtor to retain sufficient monies to pay her actual expenditures, thereby minimizing the amount of disposable income available to creditors. See *In re Tracey*, No. 86-A-0481 (Bankr. D. Md. Oct. 17, 1986) (LEXIS, Bankruptcy library, Cases file) (determining whether the debtor's mother was a dependent so as to enable the debtor to consider expenses for her care in determining what disposable income remained).

³¹⁸ 51 Bankr. 385, 396-97 (Bankr. N.D. Ohio 1985). While *Grant* involves § 707(b), there are certain similarities between finding abuse under § 707(b) and disposable income under § 1325(b). Both sections require, under an expansive paradigm, a determination with respect to a debtor's lifestyle. See Breitowitz, *Installment I*, *supra* note 19, at 353-55.

amount. The rationale for deciding that the court should be able to revisit one decision but not another is significant. Under an expansive interpretation of the term disposable income, the court would look at whether any expenditure on behalf of one's college-aged children is justified. Under a narrow interpretation of the same term, the court would assume the debtor's entitlement to give money to her daughter; the question becomes how much money is appropriate. In reaching that decision, the court should be guided by how much the mother has given her daughter (and her other children) in the recent past and what other college-aged children receive from their parents. Therefore, once having made the subjective determination to look at a particular expenditure, a court under a narrow paradigm would use more objective criteria to determine the "reasonableness" of that expenditure.

There may be isolated circumstances when, even under a narrow interpretation, the court may determine that an expenditure is improper. Consider a debtor who claims that she needs large sums of money to support three homes, two of which are used solely for vacations. The expenditures over and above those needed to maintain the primary residence hardly seem "reasonable" and "necessary" for the support of the debtor and her family. There is a vast difference between saying that the debtor does not need three homes and that the debtor's primary residence is too "posh" and that she must relocate to less expensive surroundings.³¹⁹ The narrow interpretation of what one reasonably needs to support oneself should not be seen as a license for a debtor to spend excessively while in a Chapter 13. On the other hand, courts should not be in the business of equalizing all debtors to the same social standard on the basis of the court's own predilections of how people in financial trouble ought to live.

The following hypothetical contrasts how a court would handle a debtor's expenses under the narrow and expansive paradigms. Consider a debtor who leases two motor vehicles for family transportation. The debtor and her family have used two cars for the past six years. Unlike *In re Bryant*,³²⁰ where the cars involved were recent model Buicks (which the court found objectionable), suppose the leased vehicles were both Mercedes. Assume as well that the debtor could lease two recent Buicks and thereby reduce her monthly lease payments by \$300. A court's ordering the debtor to lease less costly vehicles, a result that

³¹⁹ See, e.g., *In re Kitson*, 65 Bankr. 615, 621 (Bankr. E.D.N.C. 1986); *In re Jones*, 55 Bankr. 462, 467 (Bankr. D. Minn. 1985).

³²⁰ 47 Bankr. 21, 25 (Bankr. W.D.N.C. 1984). While this case involved § 707(b), there are, as has been noted, similarities in determinations under §§ 707(b) and 1325(a). See *supra* text accompanying notes 269-71.

could be achieved under a narrow interpretive approach, is very different from saying that the debtor should not lease any vehicles but should use public transportation, a result that would be achieved under an expansive interpretive approach.³²¹ Imposing reduced lease rental obligations recognizes both the debtor's freedom to use automotive transportation and the creditors' legitimate desire to be repaid.

One can vary this hypothetical to obtain a different result. Consider that the debtor is leasing the vehicles in question from a close friend and, as such, is paying more than the fair rental value of the cars. Assume that the debtor could lease the same vehicles for \$100 less per month in the open market. Can the court, under either paradigm, determine that this \$100 is not a reasonable expenditure? It would seem in this instance that the court is balancing the relative priority between the debtor's friend (who may well need the money due to her own financial problems) and the debtor's creditors. In this instance, under both an expansive and narrow interpretation of the term disposable income, the creditors appear to be more deserving of the extra \$100 per month on the theory that the collective approach is at the heart of our bankruptcy laws.

It seems that one ultimately comes back to an approach very similar to the one suggested in the context of section 707(b).³²² Each case should be handled by application of a flexible standard that recognizes the debtor's freedom to determine at least the contours of how she lives while according the court some discretion in balancing that freedom with the rights of creditors to be repaid. Applying a uniform standard of how debtors should live, whether based on a court's subjective assessment or a fixed federal standard creates, in essence, a class of bankruptcy poor. A case-by-case approach frees both the debtor and the court by permitting the court to blend both an objective and subjective component into its decisionmaking process.

Under the narrow interpretive approach, a court will probably decrease the debtor's disposable income, although not dramatically so, and will more liberally construe the term "reasonable," which is the coun-

³²¹ See *In re Rogers*, 65 Bankr. 1018, 1021-22 (Bankr. E.D. Mich. 1986). In *Rogers*, although the court agreed that the debtor needed at least one of the two cars owned, it did not confirm the debtor's Chapter 13 plan. The court, applying an expansive approach, objected to the debtor's choice as to which car to keep—a sports car over an economy sedan. As a result, it concluded that the debtor was maintaining a "hot" lifestyle at the expense of creditors. In other words, the court identified an asset that could have been sold to provide more income to the debtor's creditors and essentially asked her to sacrifice it, with little or no examination of the debtor's past lifestyle.

³²² See *In re Kitson*, 65 Bankr. 615, 620-21 (Bankr. E.D.N.C. 1986), which suggests that there are similarities between the § 1325(b) and § 707(b) inquiries.

terpart term in conjunction with expenditures. Both of these results would restore a measure of the debtor's autonomy that an expansive interpretation would undermine. Using as an example the case of *In re Gunn* noted earlier,³²³ a narrow interpretation of disposable income would look at the reasonableness of the debtor's prior expenses occasioned by living separately and apart and deem a continuation of the same level of expenditures to be appropriate.

If courts do not intervene with respect to a debtor's expenditures, creditors will be forced to make a more careful evaluation of the risks of lending to a particular individual.³²⁴ Rather than making the court a collection agency, creditors ought to do a better job of evaluating credit risks, with the consequence of an error in that process falling on the creditors rather than the debtor.³²⁵ This shift in risk allocation makes sense from an economic perspective. Creditors are in the best position to judge the ability of an individual to repay. If a creditor lends and the debtor fails to repay, the creditor is better positioned, both by responsibility and financial power, to bear the consequences of an error in judgment.³²⁶ Unlike those studies of the credit industry that have focussed on the rate of return in bankruptcy cases,³²⁷ there is demonstrable evidence to prove that filings as a percentage of credit dollars extended have decreased.³²⁸ The credit industry will, in all likelihood, pass on to

³²³ For a discussion of *In re Gunn*, 37 Bankr. 432, 433-36 (Bankr. D. Or. 1985), see *supra* notes 272-76 and accompanying text.

³²⁴ Senator Metzenbaum stated:

What was there in 1983 that made it right for a debtor to do that [prove earnings and agree not to have a mortgage in the future]? Merely because the creditor's lobby wanted it? That was not reason enough. They were not being hurt. They had an easy remedy. If you do not want people to go bankrupt and discharge some of their debts, *do not lend them money*. The reason the credit industry is a creditor is because it offers credit and that is how it makes money. It charges for offering that credit and it does not give that money away nor does anyone expect it to. But it did not have the right and it does not have the right, and under the law it will not have the right, to cause a debtor to mortgage his or her future.

129 CONG. REC. S5387 (daily ed. April 27, 1983). For a contrary view, see Eisenberg I, *supra* note 8, at 981-83.

³²⁵ For a discussion of risk allocation in this context, see A. KRONMAN & R. POSNER, *supra* note 192, at 163; see also Weston, *Some Economic Fundamentals for an Analysis of Bankruptcy*, in *Reform Symposium*, *supra* note 101, at 47, 48-55.

³²⁶ See sources cited *supra* note 324.

³²⁷ See, e.g., PURDUE STUDY, *supra* note 62, at 23-36.

³²⁸ See 129 CONG. REC. S5387 (daily ed. April 27, 1983) (Senator Metzenbaum stated: "[T]he number of bankruptcies per credit dollar of credit outstanding had actually decreased since the Amendments of 1980. But the Credit Industry never paid any attention to the reality of that fact."). For a general criticism of the credit industry studies, see Sullivan, Warren & Westbrook, *Limiting Access*, *supra* note 37; see also Sullivan, Warren & Westbrook, *supra* note 10.

debtors as a whole any increased cost caused by revised risk allocation, and this could well take the form of increased credit costs.³²⁹ If the credit risk is diminished, however, credit losses may correspondingly be diminished, and there will be little added cost to pass along to the borrowing community.³³⁰ Even if this is not the case, the risk of added cost for all debtors is considerably more palatable than limiting the content of plans debtors may confirm in Chapter 13 cases. It is likely that all debtors bear the cost of nonpayment by other debtors; however, the Code is designed to protect all debtors and will protect those individuals now paying increased credit costs should they ever become debtors under the Code.

Additionally, a narrow reading of the term disposable income permits the court to avoid assuming the role of debt counselor, a task that must be assumed if the court is to determine what a debtor is permitted to spend. Although many individuals are in need of counselling so that they can better handle their expenses, a court should not attempt to perform this function, a task that extends well beyond its duties as an adjudicator.³³¹

1. Interpretation of the Term "Projected"

Interpretation of the term "projected" has not, to date, had much attention in the case law.³³² Section 1325(b) requires that the debtor repay only the income *projected* to be received rather than the income *actually* received in the three year period following confirmation of her plan. Therefore, if a debtor makes a projection based on what she expects or plans to earn in the forthcoming years, even if she earns more or changes jobs, her initial determination should be binding, subject to the provisions of section 1329.³³³ The critical determination that should

³²⁹ This consequence was noted by the court in *In re Grant*, 51 Bankr. 385, 388-90 (Bankr. N.D. Ohio 1985). It is this risk that was at the heart of the observations of many of the proponents of the Amendments when these proponents maintained that the Amendments would ease the cost of and access to credit for middle-class America. See *id.* at 389; see also Weston, *supra* note 325, at 98.

³³⁰ One should ask, however, whether this loss will be passed on to consumers and to which consumers the loss will be passed. See Weistart, *The Costs of Bankruptcy*, in *Reform Symposium*, *supra* note 101, at 118-19.

³³¹ For an example of the authority granted to the court performing its adjudicative role, see 11 U.S.C. § 707 (1982 & Supp. III 1985), which gives the court broad discretion to dismiss a case on its own motion. This adjudicative function creates difficulties in the context of § 707(b), because the court must also perform a fact-finding function and hence serve, at least in part, as prosecutor. See *supra* notes 104-08 and accompanying text.

³³² For example, the court in *In re Akin*, 54 Bankr. 700, 702-03 (Bankr. D. Neb. 1985), completely ignores the term "projected" and speaks about monies "received."

³³³ See *infra* notes 353-92 and accompanying text.

be made in evaluating the projection is whether it represents a good faith estimate, taking into account all known variables, of what a debtor believes she will earn from whatever income-producing activity that she plans to pursue.

In determining how the term "projected" should be applied, courts should be cognizant of the possibility that the debtor's determination of her projected future income will have *res judicata* effect.³³⁴ The doctrine of *res judicata* has been applied in the context of Chapter 13 plans to prevent relitigation of reorganization issues.³³⁵ Once a determination of projected income is made, the debtor should be able to make certain changes in her life, even if these changes may increase her income. Assuming that the debtor did not intend to make this change at the time the plan was proposed and that the debtor did not fail to disclose any intended change to the court, then this increase in income should not inure to the benefit of the creditors.³³⁶ Similarly, in the reverse situation, where a debtor earns less than her projected income, the debtor should be bound by her projection, unless she can obtain relief under section 1329(a).

2. How Voluntary is Voluntary?

The above analysis of section 1325(b) suggests that although Chapter 13 may be voluntary in the sense that it is the debtor who elects to file, the true voluntariness of Chapter 13 is thrown into question by its requirements. While Congress can condition the debtor's ability to obtain a Chapter 13 discharge on the relinquishment of certain rights, the *quid pro quo* under the present version of Chapter 13 relates to whether or not a debtor is working and to the nature and amount of her income.³³⁷ If the court can condition a discharge on a

³³⁴ See *In re Shaffer*, 48 Bankr. 952, 957-58 (Bankr. N.D. Ohio 1985). But see *In re Chinichian*, 784 F.2d 1440, 1444 (9th Cir. 1986) (finding *res judicata* inapplicable and revoking its confirmation order where the court specifically had postponed resolution of the issue in question).

³³⁵ See, e.g., *In re Evans*, 30 Bankr. 530, 531 (Bankr. 9th Cir. 1983), *aff'd* 22 Bankr. 980 (Bankr. S.D. Cal. 1982); *In re Russell*, 29 Bankr. 332, 335 (Bankr. E.D.N.Y. 1983); *In re Lewis*, 8 Bankr. 132, 137 (Bankr. D. Idaho 1981); see also Note, *Res Judicata and Collateral Estoppel in Bankruptcy Discharge Proceedings*, 37 WASH. & LEE L. REV. 281, 286 (1980). *Res judicata* has not been extended to the issue of discharge itself, which can be—and frequently is—revisited by the court.

³³⁶ Had the debtor proposed her plan, knowing her income was going to increase and yet failing to provide in her plan for such increase, the court might construe this failure to account for the increase as fraud. At the least, such failure would support a basis for denying confirmation of the plan pursuant to 11 U.S.C. § 1325(a)(3) (1982 & Supp. III 1985), as the plan would not have been proposed in good faith.

³³⁷ See 11 U.S.C. § 1322(a)(1) (1982 & Supp. III 1985) (conditioning confirmation of a Chapter 13 plan on a debtor's promise of full payment to creditors from

debtor's working in a certain job for a certain time period in order that the debtor will generate disposable income, then we have come very far from the intended voluntariness of Chapter 13, which stresses the need for the debtor to choose whether and how she wants to work.³³⁸ On the other hand, because the debtor's projected as distinguished from actual earnings are the key to determining payments under a plan, she is required to continue doing only that which she contemplated doing in order to obtain a discharge. The debtor made the initial choice.

Consider a physician who files for relief under Chapter 13 and elects not to practice medicine for a three year period, choosing instead to pursue her activities as a sculptor, which will generate very little income. The debtor's expenses, which she believes will be minimal in her new career, will be paid by way of a gift from a financially well-to-do fellow artist, who believes in this physician's talent. Although the debtor will qualify as an individual with regular income,³³⁹ she will have little projected disposable income to distribute to creditors, as virtually all income received, whether from sculpting or by gift, will be

future earnings).

³³⁸ See HOUSE REPORT, *supra* note 21, at 120. The creation of this dilemma for the debtor presents issues similar to those that arise in the context of peonage. In *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984), the Ninth Circuit stated:

Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion—or may even be more coercive; such conduct, therefore, may violate the 13th amendment and its enforcing statutes. The crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person.

To date, the available data is insufficient to allow for conclusions as to either the extent of creditor coercion on debtors or whether, to the extent such coercion exists, it amounts to a subjugation of the will of the debtor. Creditor coercion has been noted, however, in the garnishment context and hence is an issue well worth investigating. See *supra* notes 277-78, 301-11 and accompanying text.

The interrelationship between choice and peonage was noted by Referee Dryer in the context of the debates regarding a 1932 congressional proposal to adopt a suspended discharge. See *supra* notes 29-31 and accompanying text. He stated:

I do not care what your provisions and exceptions are, the main purpose of that bill is not to let the wage earner get his discharge if within two years he can pay his bills out of future earnings. That is not completely involuntary, because he need not come in, but it is saying, if you come in you are going into slavery; either go into servitude or stay out of the bankruptcy court.

Joint Hearings, *supra* note 78, at 622.

³³⁹ 11 U.S.C. § 101(27) (1982 & Supp. III 1985) provides:

'Individual with regular income' means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stock broker or a commodity broker.

necessary for support.³⁴⁰ Assume that the plan as proposed contemplates payments to creditors of the same amount that they would have received in a Chapter 7 case—and thereby satisfies the best interests test under subsection 1325(a)(4). Can the court refuse to confirm such a plan when creditors complain that the debtor is not working up to her earning potential? Had the debtor continued to work as a physician, she could have repaid her creditors in full. Although the creditors could not directly force the physician to minister to patients, as that would be a contract of enslavement,³⁴¹ they could try to do so indirectly by indicating to a sympathetic court that, if the debtor practiced medicine, her projected disposable income would provide repayment in full to her creditors. Therefore, the debtor's decision to sculpt was not in good faith. If a court accepts the creditors' approach, the debtor would have to resume work as a physician in order to obtain confirmation of her Chapter 13 plan and the desired discharge.

The fact that the court in this example would be conditioning discharge on working is not in itself offensive, primarily because the theory behind Chapter 13 is that one will repay creditors out of one's future earnings.³⁴² Property of the Chapter 13 estate includes future income.³⁴³ What is difficult about the hypothetical is that the court is not just saying that the debtor must work, but it is indicating what type

³⁴⁰ Cf. 11 U.S.C. § 1325(b)(2)(A) (1982 & Supp. III 1985) (excluding from "disposable income" income necessary for support).

³⁴¹ See *In re Noonan*, 17 Bankr. 793, 798 (Bankr. S.D.N.Y. 1982); *ABC v. Wolf*, 52 N.Y.2d 394, 401-02, 420 N.E.2d 363, 366, 438 N.Y.S.2d 482, 485 (1981); Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 372 (1978). One can also ask whether, even if the debtor agreed to work for a particular creditor at a specific job, this would satisfy the requirements of § 1325(a)(3), which requires not only that the plan be proposed in good faith but also that it not be proposed in a manner forbidden by law. In *In re Noonan*, 17 Bankr. at 800 n.16, Judge Babbitt addressed but did not resolve this issue in the context of a potential violation of the thirteenth amendment, namely, where the debtor is required to work for her creditors under Chapter 11.

³⁴² Property of the estate, as defined in Chapter 13, includes future income. See 11 U.S.C. § 1306(a)(2) (1982). Property of the estate, as defined in Chapter 7, however, does not include future income. See 11 U.S.C. § 541(a)(6) (1982 & Supp. III 1985). It should also be noted that 11 U.S.C. § 1322(a)(1) (1982 & Supp. III 1985) requires that a debtor's Chapter 13 plan provide that all or *such portion* of future income as is necessary to effectuate the plan be submitted to the supervision and the control of the trustee. Significantly, however, this particular provision does not require that the debtor use her future income; rather, it provides for what the debtor must do if she does use such income. See *In re Lepper*, 58 Bankr. 896, 898 (Bankr. D. Md. 1986) (finding that § 541's exclusion of earnings as property of the estate begins at conversion, and that preconversion earnings are not part of the estate, but subject to the trustee's supervision). For an overview of the differing treatment of wages in Chapters 7 and 13, see Annotation, *Exception from Bankruptcy Estate, Under 11 USCS § 541(a)(6), of Earnings from Services Performed by an Individual Debtor After Commencement of Case*, 76 A.L.R. FED. 853 (1986).

³⁴³ See 11 U.S.C. § 1306(a)(2) (1982).

of work the debtor must perform. Moreover, outside of the bankruptcy context, creditors would have no control over the debtor's occupation and would run a risk that the debtor could elect to leave a lucrative job, thereby changing the original basis upon which credit was extended. According to creditors, a sum at least equal to what they would have received in a Chapter 7 case would no longer appear sufficient.

A variation of this hypothetical would be to consider whether the court would permit confirmation of a Chapter 13 plan if the physician proposed to work as a physician for only six months a year for the next three years, devoting the remainder of each year either to pro bono activity or sculpting.³⁴⁴ Suppose that working for this time period would permit the physician to generate sufficient income to pay for all of her anticipated annual expenses of support but that it would not generate enough to leave any disposable income. Again, one must ask whether confirmation could be denied under either section 1325(a) or (b). Is it a lack of good faith not to work for one's creditors? If this question is answered affirmatively, Chapter 13 ceases to be truly voluntary since one's ability to obtain a discharge is contingent not only on one's working but also on one's working in a particular job, that is, one that generates more money than the job of one's choosing.³⁴⁵

A debtor should be able to choose not to work at a particular occupation or to work at it only for a limited time period each year, without that choice affecting confirmation of her Chapter 13 plan. Although the election not to work or to work for only part of a year has the effect of limiting the amount of disposable income, courts have repeatedly refused to enforce specifically personal service contracts.³⁴⁶ If courts broadly construe disposable income to mean that a person must be employed at a particular job for a particular period of time, then Chapter 13 has become, in essence, a type of contract of enslavement.³⁴⁷

If one accepts that a court can require a debtor to work to obtain a discharge, then the principle of voluntariness in Chapter 13 is substantially diminished. But perhaps there is another alternative, another notion of voluntariness. For example, because the filing of a Chapter 13

³⁴⁴ One could argue that this means the debtor would not have regular income. See 11 U.S.C. § 101(27) (1982).

³⁴⁵ While Chapter 13 originally contemplated a debtor's being employed, there had been confirmation, albeit amid controversy, of minimal or zero payment plans prior to the Consumer Credit Amendments. See, e.g., *In re Harland*, 3 Bankr. 597 (Bankr. D. Neb. 1980) (no repayment); *In re Cloutier*, 3 Bankr. 584 (Bankr. D. Colo. 1980) (no repayment); *In re Thebeau*, 3 Bankr. 537 (Bankr. E.D. Ark. 1980) (no repayment); *In re Keckler*, 3 Bankr. 155, 160 (Bankr. N.D. Ohio 1980) (five percent repayment).

³⁴⁶ See *supra* note 341 and accompanying text.

³⁴⁷ See *id.*

case is voluntary,³⁴⁸ a debtor can elect not to file under Chapter 13. While she would not get the benefits of the broadbased discharge within Chapter 13, she could fend off her creditors under other applicable federal and state laws.³⁴⁹ This interpretation of voluntariness also presents problems. One must wonder whether a filing under Chapter 13 is truly voluntary, especially if one considers that a debtor may have no practical alternative. Chapter 11, while technically available, is frequently not a realistic alternative.³⁵⁰ Chapter 13 may be the sole option available to a debtor who is ineligible for relief under Chapter 7³⁵¹ and who is subject to wage garnishment, lawsuits, and levies on her assets and those of her spouse. Further, if a debtor is eligible for relief under both Chapters 11 and 13, because Chapter 11 does not mandate minimum payments out of future income, the debtor may be forced to opt for relief under Chapter 11, a result completely contrary to the Code's (and the Amendments') objective of creating incentives for debtors to seek relief under Chapter 13.³⁵² These problems will be further explored in the context of section 1329(a).

IV. SECTION 1329(a)

The diminution of the voluntariness of Chapter 13 is accentuated by section 1329.³⁵³ This section, as changed by the Consumer Credit

³⁴⁸ See 11 U.S.C. § 301 (1982).

³⁴⁹ In the peonage context, the courts have observed that it does not matter whether one voluntarily agreed to enter into a contract involving peonage. Rather, the key issue is whether, once in that agreement, it subjected the debtor to peonage. As expressed by the court in *Bailey v. Alabama*, 219 U.S. 219, 243 (1911):

Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude.

³⁵⁰ For a discussion of the effects of a Chapter 11 filing on an individual debtor, see *supra* notes 175-76 and accompanying text; see also *In re Moog*, 774 F.2d 1073, 1074-75 (11th Cir. 1985); A. COHEN & B. ZARETSKY, *DEBTORS' AND CREDITORS' RIGHTS* 303-37 (1984).

³⁵¹ This ineligibility is premised on the debtor's Chapter 7 case being dismissed pursuant to the expansive interpretation of § 707(b). See *supra* notes 110-27 and accompanying text.

³⁵² See *supra* notes 120-22 and accompanying text.

³⁵³ 11 U.S.C. § 1329(a) (1982 & Supp. III 1985) provides:

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon the request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

Amendments, provides that a debtor's Chapter 13 plan can be modified by the debtor, the trustee, or an unsecured creditor.³⁵⁴ In other words, an unsecured creditor can seek to modify a debtor's Chapter 13 plan by increasing the amount of the payments the debtor is required to make *after* a court has confirmed that plan.³⁵⁵ Prior to this change, section 1329 was silent as to who could seek to amend a Chapter 13 plan, although the Code's legislative history and the case law suggested that only a debtor could seek modifications.³⁵⁶ As expressed by the court in *In re Fluharty*, "So long as the Plan complies with applicable law, the Debtor may fashion any Plan of repayment he chooses and the unsecured creditors must content themselves with the Plan as confirmed by the Court."³⁵⁷

Because creditors are now expressly permitted and perhaps even encouraged³⁵⁸ to seek to modify the debtor's plan, the voluntariness of Chapter 13 is dramatically reduced. A debtor's effort to create a plan can be undermined by a creditor who can seek to bind the debtor to a plan the creditor finds acceptable. Phrased differently, a debtor can be bound by a plan that, although initially acceptable to her, becomes unacceptable due to modifications proposed by creditors and permitted by the court. Such a result is all the more anomalous when one recalls that creditors are not permitted initially to vote on a debtor's plan.³⁵⁹ Thus,

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

³⁵⁴ Act of July 10, 1984, Pub. L. No. 98-353, § 319, 98 Stat. 333, 357 (codified as amended at 11 U.S.C. § 1329(a) (1982 & Supp. III 1985)).

³⁵⁵ Two recent decisions imply an expansive reading of § 1329(a), without citing that section, by requiring in one instance that the debtor's plan be evaluated and amended every six months to include increased income, *see In re Bear*, 789 F.2d 577, 578 (7th Cir. 1986), and in the other instance that the plan must provide for payment to creditors of increased income, *see In re Akin*, 54 Bankr. 700, 702-03 (Bankr. D. Neb. 1985).

³⁵⁶ *See In re Fluharty*, 23 Bankr. 426, 429 (Bankr. N.D. Ohio 1982); HOUSE REPORT, *supra* note 21, at 431.

³⁵⁷ *Fluharty*, 23 Bankr. at 429.

³⁵⁸ Since pre-Amendments § 1329 did not provide creditors the opportunity to act in this capacity, the section, as amended, might well be viewed by some creditors as an invitation for them to act.

³⁵⁹ *See* 11 U.S.C. § 1325 (1982 & Supp. III 1985); *cf.* 11 U.S.C. § 1126(a) (1982) (allowing the creditors in a Chapter 11 case to vote on the debtor's reorganization plan). It is noteworthy that although a court's discretion to approve a Chapter 13 plan is limited where the holder of an allowed unsecured claim objects to the plan, the court may still under the enumerated conditions approve of the plan. *See* 11 U.S.C. § 1325(b)(1) (1982 & Supp. III 1985). Thus, creditors under Chapter 13 do not have the same power to reject a plan as do their counterparts under Chapter 11. It is also noteworthy that a court has recently confirmed a Chapter 13 plan where, although the plan provided for payments to creditors, the creditors failed to file proof of their claims and thus were not entitled to payments from the debtor. Consequently, the debtor re-

section 1329(a) can be viewed as allowing creditors the "vote" by permitting them to second guess the Chapter 13 plan proposed by the debtor and confirmed by the court. If a court were to share the creditors' perspective, a single creditor could bind a debtor to a Chapter 13 plan not of the debtor's choosing, thereby indirectly voting to defeat the initial plan and voting in favor of a plan of their choosing. In such a case, in marked contrast to its historical purpose,³⁶⁰ Chapter 13 ceases to be voluntary.

A. *The Expansive Paradigm*

If one contrasts the purposes behind Chapters 11 and 13, the difficulties of an expansive interpretation of section 1329(a) become readily apparent. Creditors can propose a Chapter 11 plan after a debtor's exclusive filing period has expired.³⁶¹ Moreover, creditors vote on a Chapter 11 plan and at least one class of creditors must accept a plan if it is to be confirmed.³⁶² Therefore, the fact that section 1127³⁶³ permits any proponent of a plan, including a creditor, to modify a plan, makes sense. Section 1127 does not permit a party other than a proponent to seek modification of a Chapter 11 plan.³⁶⁴ The results achieved under section 1329(a) are dramatic in comparison. A creditor who could neither propose nor vote upon on a Chapter 13 plan can seek to modify it, thereby achieving indirectly what this Article has shown that Congress did not intend, namely that Chapter 13 is no longer voluntary and that creditors control a Chapter 13 case.³⁶⁵

By jeopardizing the voluntary nature of Chapter 13, section 1329(a) also creates no incentive for a debtor to work to increase income. As previously noted, if a debtor's plan incorporates all of her projected disposable income and then the debtor works hard to increase her actual disposable income, a creditor could seek to modify the debtor's Chapter 13 plan by the amount of this extra income.³⁶⁶ While one could ask whether principles of *res judicata* would permit such a

ceived a discharge free from the obligation of paying creditors. See *In re Hardy*, 56 Bankr. 95 (Bankr. N.D. Ala. 1985).

³⁶⁰ See *supra* notes 250-64 and accompanying text.

³⁶¹ See 11 U.S.C. § 1121(b), (c) (1982 & Supp. III 1985).

³⁶² See 11 U.S.C. §§ 1126, 1129(a)(10) (1982 & Supp. III 1985).

³⁶³ 11 U.S.C. § 1127(a) (1982) (emphasis added) provides in relevant part: "The proponent of a plan may modify such plan"

³⁶⁴ See *id.* (allowing only the proponent of the plan, whether a claiming creditor or the reorganized debtor, to seek such modification).

³⁶⁵ See *supra* notes 250-64 and accompanying text.

³⁶⁶ See *In re Bear*, 789 F.2d 577, 578 (7th Cir. 1986); *In re Akin*, 54 Bankr. 700, 703 (Bankr. D. Neb. 1985).

result,³⁶⁷ there is no incentive for a debtor to earn more than the amount projected. As amended, section 1329 thus exaggerates the errant policies created by section 1325(b).³⁶⁸ Not only will an individual debtor have the contents of her Chapter 13 plan governed by her future earnings, but also she will be exposed, for the life of that plan, to an "ability to pay" standard that allows her creditors to exact even more.³⁶⁹

The following hypothetical demonstrates this problem. Consider a debtor who elects to change careers. Assume that the debtor is a high school graduate who has taken various college-level computer science courses but who has been working as a short-order cook. She proposes a Chapter 13 that incorporates the projected disposable income of a cook's earnings. The plan contemplates that creditors will obtain twenty-five cents on the dollar. Suppose the debtor decides, after the plan is confirmed, to further her computer science studies and to work as a programmer at an annual salary three times that of a short-order cook. Are the debtor's creditors entitled to her future incremental earnings as a programmer? If the determination of projected disposable income is not given *res judicata* effect, as was suggested in the context of section 1325(b),³⁷⁰ then there would appear to be little incentive for the debtor, during the three year period after the plan is confirmed, to pursue further education and an enhanced career. To do so would inure solely to the benefit of her creditors. Thus, if there is a definite societal need for computer programmers and if, as a matter of economics, it makes sense for members of society to pursue those jobs for which their aptitude and training prepares them, then the effect of section 1329(a) is counterproductive.³⁷¹ While it may benefit a narrow group of creditors over the short run, it will have a negative social and economic impact over the long haul.³⁷²

³⁶⁷ See *supra* notes 335-36 and accompanying text.

³⁶⁸ This observation is highlighted by Collier:

To complement its amendment adding section 1325(b), the Bankruptcy Amendments . . . also amended section 1329(a) of the Code to provide that a modification of the plan could be sought not only by the debtor, but also by . . . the holder of an unsecured claim. This amendment is intended to carry the ability-to-pay standard forward to any modifications of the plan.

5 COLLIER, *supra* note 266, at § 1329.01[b].

³⁶⁹ See *In re Bear*, 789 F.2d at 578; *In re Akin*, 54 Bankr. 700, 703 (Bankr. D. Neb. 1985).

³⁷⁰ See *supra* notes 335-36 and accompanying text.

³⁷¹ See A. KRONMAN & R. POSNER, *supra* note 192, at 230-61.

³⁷² For a discussion of the policies supporting the fresh start doctrine in bankruptcy law, see *supra* notes 43-56 and accompanying text.

If creditors could convince a court to amend a Chapter 13 plan whenever the debtor seeks to improve herself, the creditors' positions would be improperly improved. Ostensibly, the creditors evaluated the credit risks of and extended credit to the debtor when she was employed as a short-order cook.³⁷³ Thus, if the debtor increases her earnings by enhancing her career status, that increase should not inure to the benefit of the creditors because they never looked to nor bargained for that increase in the first instance. To give creditors that benefit is to diminish creditors' lending risks at the expense of debtors and society as a whole.

Consider, however, the earlier hypotheticals involving the physician who elected to sculpt rather than minister to patients. In that context, it was argued that the physician should be able to choose not to carry out a highly valued social function, namely, caring for the sick.³⁷⁴ Those hypotheticals suggest a critical distinction between sections 1325 and 1329. Consider the physician who calculates projected disposable income on the basis of her earnings in medical practice. After the Chapter 13 plan is confirmed, the debtor determines that she wants to sculpt rather than continue as a physician. In making this election, the debtor's available future income will drop dramatically. At this juncture, are creditors entitled to payments based on projected as distinguished from actual income such that the debtor can be precluded from modifying her Chapter 13 plan under section 1329? If the determination of projected income is given *res judicata* effect, then in this instance the debtor cannot modify her plan, and, if she cannot make the payments proposed thereunder, she will be denied a discharge.

This determination is not inconsistent with the hypotheticals in which the physician made the determination to switch jobs at the time she proposed her plan. Confirmation of Chapter 13 plans is premised on projected and not actual income.³⁷⁵ Debtors are called upon to make a judgment, *at the outset*, as to how their creditors will be treated. A creditor dissatisfied with the result could seek, before confirmation, to dismiss the Chapter 13 case.³⁷⁶ Where, as in the instant hypothetical, creditors relied on the debtor's projection only to find, when the debtor

³⁷³ For views that are more sympathetic to creditors, see Cyr, *supra* note 71, at 280-81; Eisenberg I, *supra* note 8, at 977-991.

³⁷⁴ See *supra* notes 339-45 and accompanying text.

³⁷⁵ See 11 U.S.C. § 1325(b)(1) (Supp. III 1985); *contra In re Akin*, 54 Bankr. 700, 702-03 (Bankr. D. Neb. 1985) (debtor's Chapter 13 plan should provide for an automatic increase in payments to creditors should his actual payments increase).

³⁷⁶ See 11 U.S.C. § 1307(c) (1982 & Supp. III 1985). In view of the word "including," the bases for conversion specifically enumerated within this subsection are nonexclusive.

seeks to lower her income substantially, that their reliance was misplaced, the creditors have been deprived of their right to exercise certain rights that they would have exercised had they known about the career change possibility at the outset. Therefore, to balance the competing needs of debtors and creditors alike, although debtors should be able to determine freely at the outset how their projected income will be generated, they should be bound by their projections, absent a material change in circumstances.³⁷⁷ Creditors, on the other hand, should not preclude debtors from working at whatever job they choose. Once a plan is confirmed, however, these creditors should receive the income that the particular work relied on to make a projection would generate, again absent a material change in the debtor's circumstances. A material change in the debtor's circumstance would involve the types of issues that enabled debtors to obtain hardship discharges under section 1328—catastrophic illness or incapacity, loss of one's job, national disaster, death of a spouse, and perhaps even birth of new children.³⁷⁸

This suggested approach leaves open the question of the precise scope and purpose of section 1329(a). The wording of this section, unlike that in section 1328(b), does not limit it in applicability to "disaster" situations.³⁷⁹ Nonetheless, a debtor could still seek to modify her Chapter 13 plan under section 1329 in the event of a catastrophic event in those situations in which the debtor would not, at the time of the untoward event, have paid creditors what they would have received under Chapter 7.³⁸⁰ Therefore, because the conditions of a hardship discharge would not be satisfied, one reading of section 1329 would allow the debtor to seek plan modification under that section so as to obtain a discharge in Chapter 13. This would avoid requiring the debtor to convert her case to Chapter 7, under which she would receive a more limited discharge.

In sum, the difference in whether a debtor can change the nature of her employment seems to hinge on timing. If the debtor chooses to

³⁷⁷ This material change in circumstances is contemplated by the Code in the hardship discharge provisions of 11 U.S.C. § 1328(b) (1982).

³⁷⁸ See, e.g., *In re Mannings*, 47 Bankr. 318, 320-321 (Bankr. N.D. Ill. 1985) (holding that debtor's temporary unemployment entitled him to modify his Chapter 13 plan to include arrearages incurred during his unemployment). Section 1328(b), 11 U.S.C. § 1328(b) (1982), permits the debtor to obtain a discharge if the failure to complete payments under a Chapter 13 plan is due to circumstances beyond her control, if she has paid to her creditors at least what they would get in a Chapter 7 case, and if the plan cannot be modified under § 1329.

³⁷⁹ See 11 U.S.C. § 1328(b) (1982) (specifically referencing "circumstances for which the debtor should not justly be held accountable . . .").

³⁸⁰ Payment of at least what creditors would obtain in a Chapter 7 case is a prerequisite for a hardship discharge under 11 U.S.C. § 1328(b)(2) (1982).

change careers before confirmation, the change should be permitted by the court. If the debtor changes careers after confirmation, she should be permitted to do so but is not relieved of her obligation to make plan payments based on the figures utilized for confirmation purposes. In the one situation where a debtor is discouraged from leaving a well-paying job to sculpt, the result is justified by the debtor's own choice. In the other situation, creditors lent and "permitted" confirmation on certain assumptions. They are entitled to know that these assumptions will remain in place.

An expansive reading of section 1329(a) also raises the possibility of another anomalous result. By its terms, section 1322 permits a debtor to file a liquidating plan under which she would obtain all of the benefits of the expansive discharge provisions of Chapter 13 while accomplishing that which is achieved in a Chapter 7.³⁸¹ Section 1329(a) can be read expansively to permit creditors to present to the court a request that the debtor's reorganization plan be amended to provide for liquidation of the debtor's non-exempt assets. If the court were to approve of such a modification, creditors would have forced the debtor to liquidate when the debtor wanted to reorganize. Again, such a result undermines the Chapter 13 purpose of encouraging voluntary reorganizations.³⁸² Because Chapter 13 is voluntary and creditors cannot force a debtor to reorganize using her future income,³⁸³ a creditor should not be entitled to circumvent a debtor's quest for reorganization unless that creditor can obtain a conversion under section 1307(c).³⁸⁴ Since section 706 precludes a creditor from preventing a debtor from reorganizing, even if the Chapter 7 case were involuntarily filed,³⁸⁵ one has to wonder why the Consumer Credit Amendments should be interpreted in a manner that would permit a creditor to liquidate a debtor's assets when the debtor herself wants to reorganize.

A similar problem has been presented to the courts in the context of farmers.³⁸⁶ Due in large part to the unfairness resulting to the

³⁸¹ See 11 U.S.C. § 1322(b)(8) (1982). For an overview of the application of this section, see Sherman, *Expanding Chapter 13 Eligibility: Liquidating Wage Earners' Plans Under 11 U.S.C. § 109(e)*, 1 BANKR. DEV. J. 1 (1984).

³⁸² See *supra* notes 250-64 and accompanying text.

³⁸³ See 11 U.S.C. § 303(a) (1982).

³⁸⁴ 11 U.S.C. § 1307(c) (1982) provides that, "on request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title."

³⁸⁵ See 11 U.S.C. § 706(c) (1982).

³⁸⁶ See, e.g., *Cassidy Land & Cattle Co. v. Commercial Nat'l Bank & Trust Co.*, 747 F.2d 487 (8th Cir. 1984); *In re Button Hook Cattle Co.*, 747 F.2d 483 (8th Cir. 1984); *In re Rementer*, 58 Bankr. 723 (Bankr. D. Del. 1986); *In re Huebner*, 58 Bankr. 600 (Bankr. W.D. Wis. 1986); *In re Lange*, 39 Bankr. 483 (Bankr. D. Kan. 1984). One should note that the new Chapter 12, enacted on October 27, 1986, deals

farmer who operates a very cyclical business, a creditor is expressly prohibited from putting a farmer into an involuntary Chapter 7 case.³⁸⁷ When creditors attempted to file a liquidating plan in a debtor farmer's Chapter 11 case, the debtor argued that this was tantamount to filing an involuntary Chapter 7 case and hence prohibited by the Code. In permitting confirmation of a liquidating plan, the court in *In re Button Hook Cattle Co.*³⁸⁸ observed that, while the Code accorded debtor farmers *defensive* protection, it did not also accord them *offensive* protection.³⁸⁹ Applying the defensive/offensive approach to liquidating Chapter 13 cases, one arrives at a different result than did the *Button Hook* court. According a debtor a right to reorganize seems to be an offensive weapon. Permitting a creditor to force a debtor to liquidate when she wants to reorganize also seems to be an offensive tool. Therefore, unlike *Button Hook*, where the protection from involuntary filings is protective of the debtor, the debtor's ability to reorganize in a Chapter 13 benefits debtors and creditors alike. Therefore, the quest to balance the protections accorded debtors and creditors in the context of Chapter 13 cases should not lead to a right of creditors to force a debtor to liquidate in Chapter 13. Such a result would run contrary to the goal of protecting creditors in a Chapter 13 plan in the first instance.

B. *The Narrow Paradigm*

There is nothing in section 1329 that mandates that a court take a position contrary to the fresh start policy. Therefore, in applying section 1329, a court should interpret this provision narrowly, allowing it to counter those debtors who are truly abusing Chapter 13 while avoiding a rewriting of bankruptcy policy. In the context of sections 707(b) and 1325(b), it was noted that the courts should look at a host of factors in determining whether a Chapter 7 case should be dismissed or Chapter 13 plan should be confirmed rather than relying on a rigid and inflexible standard.³⁹⁰ Similarly, in the context of section 1329(a), the mere fact that a debtor's income has increased should not, in and of itself, signal that payments to creditors should increase. Any such expansive interpretation would reinsert a creditor "vote" on the debtor's Chapter 13 plan. A narrow interpretation that would preserve the basic tenets of bankruptcy policy noted throughout this Article would suggest

particularly with farmers and farming operations. See *supra* notes 3, 10.

³⁸⁷ See 11 U.S.C. § 303(a) (1982); see also HOUSE REPORT, *supra* note 21, at 321 (describing the cyclical nature of a farmer's business).

³⁸⁸ 747 F.2d 483 (8th Cir. 1984).

³⁸⁹ *Id.* at 486.

³⁹⁰ See *supra* notes 159-224, 312-53 and accompanying text.

that section 1329(a) was intended to permit creditors to seek and courts to consider approving modification of Chapter 13 plans in several distinct situations. First, if the debtor, prior to confirmation, has failed to disclose information that could have altered a creditor's determination of how to proceed and if the creditor does not want to seek dismissal or conversion to Chapter 7, the court should consider modifying the Chapter 13 plan to take into account the information not disclosed. Consider a debtor who failed to disclose a settlement agreement with a former spouse that, while not yet approved by the applicable court, was all but a certainty. If this settlement would substantially lower the debtor's monthly expenditures, a creditor should be entitled to increased distributions.

Second, if there is a material change in the debtor's circumstances for the better, due to factors completely outside the debtor's control, there may be a basis for plan modification.³⁹¹ Consider a debtor, who in proposing her Chapter 13 plan contemplated the need to support her three children. Suppose two of the three children either become emancipated (*i.e.*, through marriage) or no longer require support (*i.e.*, a putative parent suddenly commences support payments). Under these circumstances, creditors should be entitled to seek modification of the Chapter 13 plan. In the example given, the quest to modify the Chapter 13 plan does not curtail the debtor's freedom any more than did the original Chapter 13 plan. What the modification does do in these instances is prohibit debtors from obtaining the windfall of changed circumstances *outside* their control. This is very different from giving creditors the benefit of changes that were solely in the debtor's control (*i.e.*, the election to change professions).

This suggested approach is fully consistent with sections 541 and 1306, which define "property of the estate."³⁹² If a debtor in a Chapter 13 case buys a lottery ticket and happens to win the lottery, these winnings become property of the estate. If such an event should happen, creditors should be entitled to share in these winnings.³⁹³ It is this sharing by creditors that, in part, distinguishes Chapter 13 from Chapter 7 where creditors would not be entitled to any of the winnings if the lottery ticket was purchased by the debtor, as distinguished from property of the estate.

³⁹¹ See *In re Koonce*, 54 Bankr. 643, 644 (Bankr. D.S.C. 1985) (court approved trustee's petition to modify debtor's repayment plan after debtor won a substantial sum of money in the state lottery). Although the trustee filed the case in *Koonce*, the effect on the debtor is the same as it would have been had the unsecured creditors themselves sought a plan modification.

³⁹² See *supra* note 342.

³⁹³ See *In re Koonce*, 54 Bankr. at 644-45.

Sections 1325 and 1329 should be applied to encourage debtors to prepare their projections thoughtfully and reasonably but not to discourage working and obtaining relief from prior financial difficulties. A narrow interpretation of both of these provisions preserves the debtor's freedoms without depriving creditors of the repayment of that which is owed them. The justifications for this balancing of interests form the conclusion of this Article.

CONCLUSION

Comparison of the risks and benefits of an expansive interpretation of the Consumer Credit Amendments with those attendant upon a narrow interpretation suggests that the narrow interpretive approach, while not a panacea, is preferable. A narrow construction of the Consumer Credit Amendments is consistent with the bankruptcy philosophy underlying the Code. Neither in enacting the Code nor in adopting the Amendments did Congress articulate an intent to override the fresh start policy. To the contrary, Congress appears to have been sensitive to the potential problems that could arise if it adopted a different position.³⁹⁴ Nothing in the Code or the Amendments expressly conditions access to bankruptcy relief upon whether one can repay one's outstanding debts.³⁹⁵ Nothing in the Code expressly permits creditors to force an individual debtor to reorganize under Chapter 13 if she wants to liquidate.³⁹⁶ These, among other factors, suggest that, while Congress attempted to shift the balance of rights between individual debtors and their creditors, it did not intend to abolish the fresh start policy.

Recommendation of a narrow interpretation of the Amendments is not tantamount to saying that the fresh start policy, as presently reflected in the Code, is a perfectly functioning doctrine. In fact, there are aspects of the Code that may not reflect the best balance between the respective rights of debtors and creditors. To that extent, these provisions should be reevaluated.³⁹⁷ One also can question whether the fresh start doctrine is a valuable doctrine in the first instance.³⁹⁸ Before aban-

³⁹⁴ See *supra* notes 76, 140, 262, 305.

³⁹⁵ See *supra* notes 9, 124-27.

³⁹⁶ See *supra* text accompanying notes 251-54.

³⁹⁷ See D. BAIRD & T. JACKSON, *supra* note 258, at 905-06 (discussing propriety of "loading up" on exemptions on the eve of bankruptcy). While this particular behavior has not been discredited by the courts, it does accord a debtor a distinct advantage over her creditors. The Amendments do prevent the discharge of "prebankruptcy splurge" items, see 11 U.S.C. § 523(a)(2)(C) (1982), and one can quite correctly ask why a similar policy should not exist with respect to prefiling restructurings to maximize exemptions.

³⁹⁸ See T. JACKSON, *supra* note 1, at 225-48.

doning an established doctrine that is reflected in a host of interwoven statutory provisions, however, there should be clear evidence of legislative intent to do so.³⁹⁹ Nothing in the legislative history of the Amendments suggests such an intent.⁴⁰⁰

A narrow interpretation of the Amendments still permits the eradication of those "abuses" that the consumer credit industry maintained existed under the Code. While recognizing the existence of these abuses, a narrow interpretation does not permit the creation of an entirely new category of abuse. Although the consumer credit industry might well have intended the Amendments to shift the balance more decisively against debtors, there is every indication that Congress did not enact wholesale the demands of this particular special interest group.

In seeking to apply the Amendments to eradicate abuse, one is confronted with the determination of exactly what abuse the Amendments were designed to eradicate. It would be wholly inconsistent with articulated bankruptcy philosophy if courts decided that abuse was synonymous with failing to repay one's debts and choosing to liquidate.⁴⁰¹ Therefore, abuse must mean something else. The narrow interpretation recommended herein suggests an ambit of that abuse that avoids many of the pitfalls of the expansive paradigm.

Under the expansive paradigm, it is arguable, although not statistically demonstrable as yet, that fewer individuals will file under both Chapters 7 and 13. Time may reveal that debtors are uncomfortable with the Code as amended. If this proves to be the case, creditors may well find themselves hoist with their own petard. Debtors will seek relief under state law remedies, and creditors, particularly those who lend transnationally, will have to pursue collection efforts in a vast number of states and, in some instances, in a variety of courts. Time and money will be expended *chasing* assets rather than *collecting* them.⁴⁰²

Under the narrow paradigm, this individual debtor "fear factor" should be reduced. Debtors will not be discouraged from seeking relief under Chapters 7 and 13, which was one of the purposes of the Amendments in the first instance.⁴⁰³ The narrow paradigm is not, however, so narrow as to emasculate the legislation. Debtors whose actions cause an affront to the bankruptcy process will still be precluded from

³⁹⁹ See Boshkoff, *supra* note 1, at 112-25, who suggests that no clear message is apparent as of yet.

⁴⁰⁰ See *supra* notes 21, 35, 78, 134, 147-48, 324, 368.

⁴⁰¹ See *supra* notes 139-52 and accompanying text.

⁴⁰² See Breitowitz, Installment II, *supra* note 19, at 66-67.

⁴⁰³ See *supra* notes 100-02 and accompanying text.

obtaining its benefits.⁴⁰⁴ The difference is in the interpretation of the term "abuse," not in the suggestion that there is no abuse at all.

Of course, it is considerably easier to say what abuse is not, as opposed to saying what it is. This Article suggests that the real abuse of the Code in Chapter 7 cases is the debtor who files in bad faith. In this context, bad faith comprises something more than being unable to repay one's creditors and living too well.⁴⁰⁵ It is being unable to repay, at least in part, because of the nature of the indebtedness and the circumstances under which the debt was incurred. Therefore, this determination will have to be made on a case-by-case basis, rather than on a summary standard that suggests that being able to repay creditors is a *fortiori* abuse.⁴⁰⁶ Abuse in the context of Chapter 13 cases occurs not when a debtor lives extravagantly in the eyes of the court, the creditors, or some fixed standard for how much individuals should spend, but when, by an objective standard, the debtor is living above her means within the framework of her existing standard of living.⁴⁰⁷ Again, courts will be forced to address how much income a debtor must apply to her Chapter 13 plan on a case-by-case basis.⁴⁰⁸ While case-by-case determinations may not provide the definitive guidelines creditors, and perhaps courts, would like, the narrow paradigm does allow courts sufficient flexibility to dismiss cases and confirm Chapter 13 plans with increased payments when they believe that in doing so the bankruptcy process would be preserved.

To the extent that courts adopt a narrow interpretation of the Amendments, creditors should have greater incentive to police their lending practices more carefully. While there is no definitive study to date on appropriate allocation of the risk of loss between debtors and creditors, there is no harm in encouraging greater care on the part of lenders. At a minimum, creditors have responsibility to lend only to those whom they reasonably expect will repay. If they fail to carry out this responsibility, then they must bear some of the loss that occurs upon the borrower's default. To the extent that lenders spread the cost of credit among all borrowers, based on the inability of some borrowers to repay, greater care in choice of borrower could, although it is unlikely given the realities of the marketplace, decrease the cost of borrowing for all.

When the Amendments read together expansively create conflicts

⁴⁰⁴ See *supra* notes 159-220, 312-31, 390-93 and accompanying text.

⁴⁰⁵ See *supra* notes 159-68 and accompanying text.

⁴⁰⁶ See *id.*

⁴⁰⁷ See *supra* notes 241-95 and accompanying text.

⁴⁰⁸ See *supra* notes 301-11 and accompanying text.

with the policy and goals of the thirteenth amendment, as enforced by the anti-peonage laws, such a result can be avoided by a narrow interpretation of the Amendments. Concerns of peonage in the bankruptcy context have a long history. Thus, an interpretation of the Amendments that is sensitive to these concerns is preferable from both a standpoint of constitutional law and bankruptcy policy. Moreover, a narrow interpretation reinforces other legal theories, including the nonenforceability of contracts of enslavement and the enforcement of other paternalistic protections.

Until it becomes so clear that Congress intended to turn existing bankruptcy law and policy on its head, a narrow interpretation of the Consumer Credit Amendments provides the most suitable means of applying these provisions. Although some have suggested that the Amendments were merely clarifying in nature, it is possible to interpret them to do much more than clarify; the Amendments can be seen as creating an entirely new approach to the fresh start policy. Such an interpretation suggests an unwarranted and unnecessary result, indeed, and one that is avoided by the adoption of the narrow interpretive approach suggested herein. Whether courts will apply increasingly the narrow approach is something only time will tell, but, given the frequency with which these issues arise, that time may not be too far off.